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# Public Engagement and Decision-Making: Moving Minnesota Forward to Dialogue and Deliberation

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## PUBLIC ENGAGEMENT AND DECISION-MAKING: MOVING MINNESOTA FORWARD TO DIALOGUE AND DELIBERATION

Lisa Blomgren Amsler<sup>†</sup> and Tina Nabatchi<sup>††</sup>

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## I. INTRODUCTION

The 2015 Hamline University School of Law Dispute Resolution Institute's symposium brought together elected officials, public managers, scholars, and practitioners of dispute resolution, for dialogue, deliberation, and to brainstorm ideas for how Minnesota might use more innovative public engagement processes across local, regional, tribal, and state governance.<sup>1</sup> How to build more meaningful public engagement in governance is an ongoing conversation in the United States and around the world.<sup>2</sup> In this article, we address two broad areas that challenge Minnesota as it moves to deepen and improve public engagement practice: the state legal framework for collaborative governance and innovations in design for public engagement processes.

First, this article introduces collaborative governance.<sup>3</sup> Next, we examine the legal framework for state and local collaborative governance, with a focus on administrative law.<sup>4</sup> Third, we address principles of system design<sup>5</sup> in public engagement as a form of

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1. See DISPUTE RESOL. INST., Symposium, *An Intentional Conversation About Public Engagement and Decision-Making: Moving from Dysfunction and Polarization to Dialogue and Understanding*, MITCHELL HAMLINE SCH. L. (Oct. 23–24, 2015), [http://open.mitchellhamline.edu/dri\\_symposia/2015/](http://open.mitchellhamline.edu/dri_symposia/2015/).

2. See, e.g., DEMOCRACY IN MOTION: EVALUATING THE PRACTICE AND IMPACT OF DELIBERATIVE CIVIC ENGAGEMENT (Tina Nabatchi et al. eds., 2012) [hereinafter Nabatchi, DEMOCRACY IN MOTION]; TINA NABATCHI & MATT LEIGHNINGER, PUBLIC PARTICIPATION FOR 21ST CENTURY DEMOCRACY (2015).

3. See *infra* Part II.

4. See *infra* Parts III–IV.

5. See *infra* Section V.A; see generally Stephanie E. Smith & Janet K. Martinez, *An Analytic Framework for Dispute Systems Design*, 14 HARV. NEGOT. L. REV. 123, 123–

collaborative governance.<sup>6</sup> We then discuss performance results for public engagement in other U.S. states and communities.<sup>7</sup> We share sample legislation, ordinances, and policies developed by a national working group of leading nongovernmental organizations (NGOs) in participatory and democratic governance as examples of how Minnesota might strengthen the legal framework for public engagement and collaborative governance.<sup>8</sup> We conclude that Minnesota has the opportunity to lead the way to innovation in public engagement.<sup>9</sup>

## II. COLLABORATIVE GOVERNANCE

Public administration scholars have offered varying definitions of collaborative governance. Several of the definitions focus more on multi-party stakeholder processes that can include what other scholars call collaborative public management and public policy or environmental conflict resolution. Generally, these definitions do not include public engagement. For example, Chris Ansell and Alison Gash define collaborative governance as: “A governing arrangement where one or more public agencies directly engage non-state stakeholders in a collective decision-making process that is formal, consensus-oriented, and deliberative and that aims to make or implement public policy or manage public programs or assets.”<sup>10</sup>

Kirk Emerson, Tina Nabatchi, and Stephen Balogh, acknowledging that the definition of collaborative governance is amorphous and its use inconsistent, define it as “the processes and structures of public policy decision making and management that engage people constructively across the boundaries of public agencies, levels of government, and/or the public, private, and civic spheres in order to carry out a public purpose that could not

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69 (2009); Lisa Blomgren Amsler et al., *Christina Merchant and the State of Dispute System Design*, 33 CONFLICT RESOL. Q. S7, S7 (2015).

6. See *infra* Part V; see generally KIRK EMERSON & TINA NABATCHI, COLLABORATIVE GOVERNANCE REGIMES (2015).

7. See *infra* Part VI.

8. See *infra* Part VI.

9. See *infra* Part VII.

10. Chris Ansell & Alison Gash, *Collaborative Governance in Theory and Practice*, 18 J. PUB. ADMIN. RES. & THEORY 543, 544 (2008).

otherwise be accomplished.”<sup>11</sup> This definition is broader by including the public instead of only including stakeholders.

Emerson and Nabatchi develop the concept of a collaborative governance regime (CGR), a public governance system in which cross-boundary collaboration represents the predominant mode for conduct, decision-making, and activity between autonomous participants who have come together to achieve some collective purpose defined by one or more target goals.<sup>12</sup> More specifically, they define a CGR as a “particular mode of, or system for, public decision making in which cross-boundary collaboration represents the prevailing pattern of behavior and activity.”<sup>13</sup>

Emerson and Nabatchi recognize that collaborative governance does not occur in a vacuum, but rather is both shaped and constrained by the surrounding system context, whose numerous influences include political, legal, socioeconomic, and environmental influences that affect and are affected by the CGR.<sup>14</sup> From this system context emerge four essential drivers; (1) perceived uncertainty, (2) interdependence, (3) consequential incentives, and (4) initiating leadership, which all help to initiate and set the preliminary direction for the CGR.<sup>15</sup>

During and after the formation of the CGR, its participants engage in collaboration dynamics, represented by three interacting components (and their subsidiary elements): (1) principled engagement (discovery, definition, deliberation, and determination); (2) shared motivation (trust, mutual understanding, internal legitimacy, and commitment); and (3) the capacity for joint action (procedural and institutional arrangements, leadership, knowledge, and resources).<sup>16</sup>

Emerson and Nabatchi identify three main types of CGRs: self-initiated, independently convened, and externally directed.<sup>17</sup> In self-initiated CGRs, participants come together after being inspired and galvanized by a set of core stakeholders who have a direct stake in addressing acute policy challenges, but where responsible

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11. Kirk Emerson, Tina Nabatchi & Stephen Balogh, *An Integrative Framework for Collaborative Governance*, 22 J. PUB. ADMIN. RES. & THEORY 1, 3 (2012).

12. See generally EMERSON & NABATCHI, *supra* note 6.

13. *Id.* at 10.

14. *Id.* at 26, 39.

15. *Id.* at 26.

16. *Id.* at 28.

17. *Id.* at 31.

authorities are diffuse and fragmented. These CGRs develop in an ad hoc and emergent manner, and engage stakeholders who participate voluntarily and have a high level of group autonomy.<sup>18</sup> Typical examples of self-initiated CGRs include community-based collaboratives, ad hoc working groups, planning committees, and informal partnerships.

In independently convened CGRs, an autonomous third party assembles participants and designs processes for interaction aimed at bridging differences around complex policy challenges where multiple, and often overlapping, authorities are involved.<sup>19</sup> These CGRs are intentionally designed to be attractive to disparate stakeholders who are encouraged or induced to participate and have limited group autonomy.<sup>20</sup> Typical examples of independently convened CGRs include independent fact-finding commissions, community visioning processes, and bipartisan policy coalitions.<sup>21</sup>

In externally directed CGRs, outside entities with sufficient authority or resources incentivize or mandate participants to work together in a preset manner.<sup>22</sup> Often the leaders of these CGRs “have a more removed or indirect stake in addressing extensive, recurring policy challenges,” but also “possess explicit, concentrated authority in the subject policy area.”<sup>23</sup> These CGRs develop through a formally structured approach that can constrain group autonomy.<sup>24</sup> Typical examples of externally directed CGRs include federal advisory committees, grant programs requiring collaboration, regional planning or operating authorities, and legislatively mandated collaborations.<sup>25</sup>

### III. COLLABORATIVE GOVERNANCE AND ADMINISTRATIVE LAW

To describe the array of processes across the policy continuum as public managers experience it, Bingham applied a broader definition of collaborative governance than Ansell and Gash or Emerson and Nabatchi, using it as an umbrella term for

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18. *Id.* at 33.

19. *Id.* at 162, 166.

20. *Id.* at 166.

21. *Id.* at 163.

22. *Id.* at 50.

23. *Id.* at 168.

24. *Id.*

25. *Id.* at 163.

administrative agency practice.<sup>26</sup> In this more broadly conceived view, collaborative governance describes a variety of system designs and processes through which public agencies can work together with the private sector, civil society, and the public to identify problems, issues, and potential solutions, design new policy frameworks for addressing them, work together on implementing programs, and find collaborative approaches to enforcing policies.<sup>27</sup>

Collaborative governance encompasses a broad array of designs and processes for stakeholder and citizen voice.<sup>28</sup> Collaborative governance can take many forms, including many experiments in public participation and deliberative democracy, collaborative public or network management, and alternative or appropriate dispute resolution (ADR) on the policy continuum.<sup>29</sup> These collaborative governance processes all provide ways for people to exercise voice and work together in governance.<sup>30</sup> This definition includes collaboration with the broadest range of partners who are outside government but within its jurisdiction, thus encompassing the general public, federal, state, regional, and local government agencies, tribes, nonprofit organizations, businesses, and other nongovernmental stakeholders.<sup>31</sup>

It also includes collaboration across the broadest scope of agency work on the policy continuum.<sup>32</sup> For this purpose, the phrase “policy process” is defined as any action by the executive branch in developing, implementing, or enforcing public policy,

26. This article paraphrases the definition used for collaborative governance in the federal government by Lisa Blomgren Bingham, *The Next Generation of Administrative Law: Building The Legal Infrastructure for Collaborative Governance*, 2010 WIS. L. REV. 297, 299 (2010) [hereinafter Bingham, *Next Generation*].

27. See *id.*; Lisa Blomgren Bingham, *Collaborative Governance: Emerging Practices and the Incomplete Legal Framework for Public and Stakeholder Voice*, 2009 J. DISP. RESOL. 269, 269 (2009) [hereinafter Bingham, *Collaborative Governance*].

28. See Bingham, *Collaborative Governance*, *supra* note 27, at 277 (describing the spectrum of collaborative governance processes and arguing that they represent a single related phenomenon of non-adversarial voice that operates across the policy continuum, including legislative, executive, and judicial functions).

29. *Id.*; see generally Scott Burris et al., *Changes in Governance: A Cross-Disciplinary Review of Current Scholarship*, 41 AKRON L. REV. 1 (2008) (discussing the current theories and literature on governance).

30. Bingham, *Collaborative Governance*, *supra* note 27, at 269).

31. *Id.*

32. *Id.* at 278.

including but not limited to identifying and defining a public policy issue, defining the options for a new policy framework, expanding the range of options, identifying approaches for addressing an issue, setting priorities among approaches, selecting from among the priorities, implementing solutions, project management, developing and adopting regulations, enforcing regulations, and assessing the impacts of decisions.<sup>33</sup>

Collaborative governance in the policy process includes collaboration through any in-person and online method, model, or process that is participatory and consensual.<sup>34</sup> This is distinguishable from adversarial or adjudicative processes. Collaborative governance in the policy process includes public involvement, civic engagement, dialogue, public deliberation, deliberative democracy, public consultation, multi-stakeholder collaboration, collaborative public management, dispute resolution, and negotiation.<sup>35</sup>

In this view, collaborative governance includes, but is not limited to, public participation and engagement as mechanisms for the voice of the public in decision-making. Legal scholars have applied collaborative governance to interagency collaboration,<sup>36</sup> contracting, and negotiated rulemaking; they have observed the limited role of public participation.<sup>37</sup> Legal scholars have also addressed the tension between legislative mandates for public participation, agency capture by organized interests in the guise of public participation, and an agency's capacity to act.<sup>38</sup> However, when it comes to public participation, legal scholars have largely focused on notice and comment in rulemaking.<sup>39</sup>

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33. *Id.* at 275, 286.

34. *Id.* at 279.

35. *Id.* at 274, 319.

36. See Jody Freeman & Jim Rossi, *Agency Coordination in Shared Regulatory Space*, 125 HARV. L. REV. 1131, 1131 (2012).

37. See Jody Freeman, *Collaborative Governance in the Administrative State*, 45 UCLA L. REV. 1, 1 (1997) (applying collaborative governance to negotiated rulemaking); Jody Freeman, *The Private Role in the Public Governance*, 75 N.Y.U. L. REV. 543, 543 (2000) (applying collaborative governance to contracting).

38. See, e.g., Jim Rossi, *Participation Run Amok: The Costs of Mass Participation for Deliberative Agency Decisionmaking*, 92 NW. U. L. REV. 174, 174 (1997).

39. See generally Lawrence G. Baxter, *The Asymmetry of Administrative Law: The Lack of Public Participation and the Public Interest: Article: Capture Nuances in Financial Regulation*, 47 WAKE FOREST L. REV. 537, 537 (2012) (arguing that the participation of bankers in federal regulatory authorities positively increases democratic



This article focuses specifically on public participation and engagement in collaborative governance because legal scholars have given public participation and engagement relatively little attention.<sup>40</sup> The following sections will focus on the legal framework for collaborative governance and public voice in federal administrative law, model state administrative procedure acts, and Minnesota administrative law.

A. *The Federal Legal Framework for Public Participation in Collaborative Governance*

While there are over two hundred mandates for public participation across the U.S. Code, in general there is no definition of public participation.<sup>41</sup> Moreover, because there is no express broad legal authority for government agencies to engage the public in decision-making through deliberative processes, public participation has devolved into limited written public comment in rulemaking<sup>42</sup> or three minutes at the microphone in public meetings.<sup>43</sup>

Bingham concluded that the existing legal framework for collaborative governance within the federal executive branch provides no mandate or right to participate except (a) notice and comment in rulemaking in the Administrative Procedure Act;<sup>44</sup> (b) transparency in the Freedom of Information Act;<sup>45</sup> (c) observation in the Sunshine Act;<sup>46</sup> and (d) miscellaneous dispersed public involvement mandates for specific agencies.<sup>47</sup>

She found discretion at the federal level to use collaborative processes under the Negotiated Rulemaking Act (NRA)<sup>48</sup> and the

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participation but that “it is also true that all of these interests are likely to be biased in general toward the [banking] industry”); Sidney Shapiro et al., *The Enlightenment of Administrative Law: Looking Inside the Agency for Legitimacy*, 47 WAKE FOREST L. REV. 463 (2012).

40. See, e.g., Bingham, *Next Generation*, *supra* note 26.

41. *Id.* at 317.

42. *Id.* at 305–06.

43. Matt Leighninger, *Three Minutes at the Microphone*, WORKING GRP. FOR LEGAL FRAMEWORKS ON PUB. PARTICIPATION (Oct. 2013), <http://cppsofseattle.org/wordpress/wp-content/uploads/2015/05/Making-public-participation-legal.pdf>.

44. Administrative Procedure Act, 5 U.S.C. § 553 (2012).

45. Freedom of Information Act, 5 U.S.C. § 552a (2012).

46. Government in the Sunshine Act, 5 U.S.C. § 552b(b) (2012).

47. Bingham, *Next Generation*, *supra* note 26, at 348.

48. Negotiated Rulemaking Procedure Act, 5 U.S.C. §§ 561–570a (2012).

Administrative Dispute Resolution Act (ADRA).<sup>49</sup> However, there was no express agency authority to provide for more public participation, collaboration, or deliberative practice other than the minimum notice and comment or public hearings required by law.<sup>50</sup> Because the term “public participation” (and its variations) is used frequently but defined rarely in laws and regulations, administrators are often confused about when and how to engage the public.<sup>51</sup>

Moreover, although the laws do not necessarily prohibit using non-conventional forms of participation, they also do not explicitly allow for it.<sup>52</sup> This leads to administrative concerns about whether particular processes are legal.<sup>53</sup> A recent report prepared after a workshop involving federal administrators, White House staffers, academics, and civil society leaders concluded that:

[T]he laws regulating participation are in tension with the functionality and mission of agencies, as well as with the purposes and goals of participation, and the current legal framework leaves public officials and staff wondering whether the best practices in participation are in fact supported—or even allowed—by the law.<sup>54</sup>

In addition, resource constraints create an obstacle to agency innovation; agency lawyers are risk averse. In the absence of a legal framework that clearly authorizes and encourages participatory and collaborative governance, agencies play it safe.

In part to address this, on his first full day in office, President Obama committed to create “an unprecedented level of openness in [g]overnment” and “a system of transparency, public participation, and collaboration” to strengthen democracy, ensure the public trust, and to “promote efficiency and effectiveness in

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49. Administrative Dispute Resolution Act, 5 U.S.C. §§ 571–584 (2012).

50. Bingham, *Next Generation*, *supra* note 26, at 348.

51. Tina Nabatchi & Lisa Blomgren Amsler, *Direct Public Engagement in Local Government*, 44S AM. REV. PUB. ADMIN. 63S, 68S (2014); PROGRAM FOR THE ADVANCEMENT OF RES. ON CONFLICT AND COLLABORATION (PARCC), PRIORITIES FOR PUBLIC PARTICIPATION AND OPEN GOVERNMENT: RECOMMENDATIONS TO PRESIDENT OBAMA 1, 6 (2013) [hereinafter PARCC, RECOMMENDATIONS TO PRESIDENT], <http://publicpolicy.pepperdine.edu/davenport-institute/content/reports/priorities-for-public-participation.pdf>.

52. 5 U.S.C. §§ 561–570a (2012); 5 U.S.C. §§ 571–584 (2012).

53. PARCC, RECOMMENDATIONS TO PRESIDENT, *supra* note 51, at 6.

54. *Id.*

government.”<sup>55</sup> President Obama’s Executive Memorandum on Transparent and Open Government directed federal agencies to work on policy together with the public and stakeholders from the public, private, and nonprofit sectors.<sup>56</sup> This memorandum launched the Open Government (OG) initiative in the U.S. federal government.<sup>57</sup> However, agency plans focused their efforts primarily on using information technology (IT) to elicit help from the public and stakeholders to accomplish their mission; there is limited genuine deliberative public engagement, collaboration, or co-production of public services or of policy.<sup>58</sup>

The six trends found by researchers were (listed from less to greater collaboration between the public and stakeholders): “(1) competitions or awards, (2) enhanced or collaborative transparency, (3) app sharing and development, (4) wikis or knowledge development across sectors, (5) online engagement for policy development through social media, and (6) platform spaces or apps for collaboration.”<sup>59</sup>

Recommendations for improving OG include: (1) using better design principles for public engagement; (2) making engagement through competitions and challenges more meaningful; (3) identifying programs to use the new collaborative platforms; and (4) integrating co-production into agency initiatives.<sup>60</sup>

In other words, the existing legal framework for collaborative governance in federal administrative law fails to adequately authorize, encourage, and support public engagement. President Obama’s efforts to use the power of the executive to address this problem have not made sufficient progress.<sup>61</sup> Analogous problems exist under the widely varying fifty state administrative procedure acts and related statutes.<sup>62</sup> The next section reviews the Model State Administrative Procedure Acts in an effort to identify possible

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55. Transparency and Open Government: Memorandum for the Heads of Executive Departments and Agencies, 74 FED. REG. 4685 (Jan. 26, 2009).

56. *Id.*

57. *Id.*

58. Lisa Blomgren Amsler & Susanna Foxworthy, *Collaborative Governance and Collaborating Online: The Open Government Initiative in the United States*, in PUBLIC ADMINISTRATION AND THE MODERN STATE: ASSESSING TRENDS AND IMPACT, 189–202, 190–95 (Eberhard Bohne et al. eds., 2014).

59. *Id.* at 195.

60. *Id.* at 199.

61. NABATCHI & LEIGHNINGER, *supra* note 2, at 207–12.

62. See Nabatchi & Amsler, *supra* note 51, at 63S–64S.

obstacles and barriers in state statutes.<sup>63</sup> The acts may provide opportunities to strengthen the legal framework supporting collaborative governance in Minnesota.

*B. The Model State Legal Framework for Collaborative Governance*

The legal framework for collaborative governance at the state government level includes many statutes similar to federal models and a number of provisions that are unique to the local government arena. States have Administrative Procedure Acts (APA), Freedom of Information and Sunshine Acts, and often advisory committee provisions in their APA.<sup>64</sup> Some states have versions of the federal ADRA and NRA, for example Texas<sup>65</sup> and Florida,<sup>66</sup> which represent the closest state models authorizing processes used in collaborative governance. A few have enacted the Uniform Mediation Act (UMA), which has language about state government use of mediation.<sup>67</sup> Many have agency-specific enabling

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63. See *infra* Section III.B.

64. *Id.*

65. Governmental Dispute Resolution Act, TEX. GOV'T CODE ANN. §§ 2009.001–2009.055 (West, Westlaw through 2015 Reg. Sess. of the 84th Legis.). In the act, Texas authorizes alternative dispute resolution. *Id.* § 2009.051 (West). The act uses the definition of alternative dispute resolution system used in the Texas Civil Practice and Remedies Code:

In this chapter, “alternative dispute resolution system” means an informal forum in which mediation, conciliation, or arbitration is used to resolve disputes among individuals, entities, and units of government, including those having an ongoing relationship such as relatives, neighbors, landlords and tenants, employees and employers, and merchants and consumers.

TEX. CIV. PRAC. & REMEDIES CODE ANN. § 152.001 (West, Westlaw through 2015 Reg. Sess. of the 84th Legis.); Negotiated Rulemaking Act, TEX. GOV'T CODE ANN. §§ 2008.001–2008.058 (West, Westlaw through 2015 Reg. Sess. of the 84th Legis.) (authorizing negotiated rulemaking). The Center for Public Policy Dispute Resolution, housed at the University of Texas, operates as the state office of dispute resolution for government in Texas. Ctr. for Pub. Pol'y Disp. Resol., *Texas ADR Statutes*, UNIV. TEX. AT AUSTIN, <https://law.utexas.edu/cppdr/resources/texas-adr-statutes/> (last visited Aug. 12, 2016).

66. FLA. STAT. ANN. § 120.573 (West, Westlaw through 2016 2nd Reg. Sess. of the 24th Legis.) (authorizing mediation); *Id.* § 120.54 (West) (authorizing negotiated rulemaking).

67. UNIF. MEDIATION ACT § 3 (NAT'L CONF. COMM'N ON UNIF. STATE LAWS 2003), [http://www.uniformlaws.org/shared/docs/mediation/uma\\_final\\_03.pdf](http://www.uniformlaws.org/shared/docs/mediation/uma_final_03.pdf) (“[T]he mediation parties are required to mediate by statute or court or administrative agency rule or referred to mediation by a court, administrative

statutes on dispute resolution and particularly mediation.<sup>68</sup> In general, the state legal framework for collaborative governance is weaker than the federal one in that it has lagged behind the federal statutes authorizing agency use of ADR and negotiated rulemaking.<sup>69</sup> Like the federal legal framework, there is very little express authority defining public participation or public engagement except in reference to rulemaking.<sup>70</sup>

While there are fifty state variations, the simplest way to illustrate common state patterns is through the Model State Administrative Procedure Acts of 1961,<sup>71</sup> 1981,<sup>72</sup> and 2010<sup>73</sup> (MSAPA), as adopted by the Uniform Law Commission.<sup>74</sup> In 1961, the MSAPA did not use the word “participation.”<sup>75</sup> However, in section 2, “Public information; Adoption of Rules,” it provided:

(a) In addition to other rule-making requirements imposed by law, each agency shall:

- (1) adopt as a rule a description of its organization, stating the general course and method of its operations and the methods whereby the public may obtain information or make submissions or requests;
- (2) adopt rules of practice setting forth the nature and requirements of all formal and informal procedures available, including a description of all forms and instructions used by the agency . . . .<sup>76</sup>

This section authorized agencies to adopt rules for the public to interact with the agency by getting information, making requests, or participating in informal procedures.<sup>77</sup> It did not mandate a standard set of such rules for all agencies.<sup>78</sup> It was silent on negotiation and collaboration.<sup>79</sup> Similar language exists in many

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agency, or arbitrator . . .”).

68. See generally SARAH R. COLE ET AL., *MEDIATION: LAW, POLICY, [AND] PRACTICE* (2011–2012 ed.).

69. Nabatchi & Amsler, *supra* note 51, at 68S.

70. *Id.*

71. See MODEL STATE ADMIN. PROCEDURE ACT (UNIF. LAW COMM’N 1961).

72. See MODEL STATE ADMIN. PROCEDURE ACT (UNIF. LAW COMM’N 1981).

73. See MODEL STATE ADMIN. PROCEDURE ACT (UNIF. LAW COMM’N 2010).

74. See UNIF. L. COMM’N, <http://www.uniformlaws.org> (last visited Aug. 12, 2016).

75. See MODEL STATE ADMIN. PROCEDURE ACT (UNIF. LAW COMM’N 1961).

76. *Id.* § 2.

77. *Id.*

78. *Id.*

79. *Id.*

states; it could be construed to authorize agencies to adopt rules for practices that include more participation and collaboration.

Negotiated rulemaking is an important example, because it is a process that expressly engages the public and stakeholders, particularly a committee of players affected by the same policy issue, in a consensus-based decision process that yields a draft rule through negotiation. Both the 1961<sup>80</sup> and 1981<sup>81</sup> MSAPA were silent on negotiated rulemaking; the 1961 version did not use the word “negotiate,” and the 1981 version only used the word “negotiate” in connection with commercial arrangements.<sup>82</sup>

Importantly, in 1981, the MSAPA added a new provision on public participation:

§ 3-104. [Public Participation].

(a) For at least [30] days after publication of the notice of proposed rule adoption, an agency shall afford persons the opportunity to submit in writing, argument, data, and views on the proposed rule.

....

(b)(1) An agency shall schedule an oral proceeding on a proposed rule if, within [20] days after the published notice of proposed rule adoption, a written request for an oral proceeding is submitted by . . . [25] persons. At that proceeding, persons may present oral argument, data, and views on the proposed rule.

....

(3) . . . Oral proceedings must be open to the public and be recorded by stenographic or other means.

(4) Each agency shall issue rules for the conduct of oral rule-making proceedings. Those rules may include provisions calculated to prevent undue repetition in the oral proceedings.<sup>83</sup>

This was a substantial step forward for public participation. It incorporated the notions of public comment on informal rulemaking and oral hearings open to the public.<sup>84</sup> However, it was still silent on collaboration, as well as forms of dispute resolution or

80. See MODEL STATE ADMIN. PROCEDURE ACT (UNIF. LAW COMM’N 1961).

81. See MODEL STATE ADMIN. PROCEDURE ACT (UNIF. LAW COMM’N 1981).

82. *Id.* § 3-116(2).

83. *Id.* § 3-104.

84. *Id.*

consensus-based processes in rulemaking and adjudication, such as negotiated rulemaking and mediation.<sup>85</sup>

Before the 2010 MSAPA, a number of states expressly added language amending their own APAs to authorize negotiated rulemaking,<sup>86</sup> although some called it “regulatory negotiation”<sup>87</sup> or “consensus-based rule.”<sup>88</sup> One state authorized negotiated rulemaking by court rule.<sup>89</sup> In 2010, the MSAPA was amended to include provisions moving closer to the model administrative laws in the federal APA.<sup>90</sup> Some twenty years after Congress passed the Negotiated Rulemaking Act of 1990, express language on negotiated rulemaking was added to the MSAPA in section 303, “Advance Notice of Proposed Rulemaking; Negotiated

85. *Id.*

86. MODEL STATE ADMIN. PROCEDURE ACT § 303 (UNIF. LAW COMM’N 2010) (noting that Idaho, Minnesota, Montana, and Wisconsin have all authorized negotiated rulemaking). Idaho provides the following rationale for rulemaking under “Notice of [I]ntent to [P]romulgate [R]ules”:

(2) The notice of intent to promulgate a rule is intended to facilitate negotiated rulemaking, a process in which all interested persons and the agency seek consensus on the content of a rule. Agencies shall proceed through such informal rulemaking whenever it is feasible to do so in order to improve the substance of proposed rules by drawing upon shared information, knowledge, expertise and technical abilities possessed by interested persons and to expedite formal rulemaking.

IDAHO CODE ANN. § 67-5220 (West, Westlaw through 2016 2nd Reg. Sess. of the 63rd Gen. Assemb.).

87. *See, e.g.*, N.M. STAT. ANN. § 12-8A-2 (West, Westlaw through 2016 Reg. Sess. of the 52nd Legis.); Governmental Dispute Resolution Act, UTAH CODE ANN. § 63G-5-102 (West, Westlaw current through 2015 1st Special Sess.) (“‘Alternative dispute resolution’ or ‘ADR’ means a process other than litigation used to resolve disputes including mediation, arbitration, facilitation, regulatory negotiation, fact-finding, conciliation, early neutral evaluation, and policy dialogues.”).

88. *See, e.g.*, ME. REV. STAT. tit. 5, § 8051-B (West, Westlaw through 2015).

89. *See, e.g.*, Indiana provides this in the Indiana Rules of Court, Rules for Alternative Dispute Resolution, which define ADR as follows:

Rule 1.1. Recognized Alternative Dispute Resolution Methods

Alternative dispute resolution methods which are recognized include settlement negotiations, arbitration, mediation, conciliation, facilitation, mini-trials, summary jury trials, private judges and judging, convening or conflict assessment, neutral evaluation and fact-finding, multi-door case allocations, and *negotiated rulemaking*.

IND. CODE ANN. tit. 34, § 1.1 (West, Westlaw through Mar. 1, 2016) (emphasis added).

90. *See* MODEL STATE ADMIN. PROCEDURE ACT § 303 (UNIF. LAW COMM’N 2010).

Rulemaking.”<sup>91</sup> The section addressed public participation by authorizing agencies to “solicit comments and recommendations from the public by publishing an advance notice of proposed rulemaking” and addressed negotiated rulemaking by authorizing agencies to appoint a committee “to comment or make recommendations on the subject matter of a proposed rulemaking,” provided the agency made “reasonable efforts to establish a balance in representation among members of the public known to have an interest in the subject matter of the proposed rulemaking.”<sup>92</sup> It also required that the committee operate by consensus decision-making.<sup>93</sup>

This section also opened the door for other collaborative or public engagement processes in section 303(d): “This section does not prohibit an agency from obtaining information and opinions from members of the public on the subject of a proposed rule by any other method or procedure.”<sup>94</sup> Section 303 represented a sign that an important and influential body, the Uniform Law Commission, recognized both the usefulness of negotiated rulemaking and arguably other forms of collaboration and public participation for state and potentially local governments.<sup>95</sup> It was a move toward adapting the legal framework for administrative agencies to expressly authorize more collaborative governance.

A parallel development occurred with respect to state agency use of dispute resolution. The 1961 MSAPA was silent on dispute resolution and mediation.<sup>96</sup> It did not use the words dispute, resolve, resolution, mediate, or negotiate in any form.<sup>97</sup> The 1981 MSAPA was generally more detailed.<sup>98</sup> It was also silent on dispute resolution and mediation.<sup>99</sup> It did use the words “resolve” and “resolution,” but not in connection with alternative dispute resolution.<sup>100</sup> It used the word “negotiate” with commercial

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91. *Id.*

92. *Id.*

93. *Id.*

94. *Id.*

95. *Id.*

96. *See* MODEL STATE ADMIN. PROCEDURE ACT (UNIF. LAW COMM’N 1961).

97. *See id.*

98. MODEL STATE ADMIN. PROCEDURE ACT § 3-116(2) (UNIF. LAW COMM’N 1981).

99. *Id.*

100. *Id.*



agreements and it used the word “dispute” with regard to issues of fact and law in adjudication.<sup>101</sup>

Prior to the 2010 MSAPA, some states did add mediation or dispute resolution language to their APAs.<sup>102</sup> The 2010 MSAPA added express authority for mediation or dispute resolution in section 403(c), “Contested Cases”: “The presiding officer, with the consent of all parties, may refer the parties in a contested case to mediation or other dispute resolution procedure.”<sup>103</sup> This language authorized dispute resolution in the context of an adjudication (contested case).<sup>104</sup> It is a fairly narrow authorization, unlike the broader ADRA, which has been construed by agencies to reach upstream in the policy development arena.<sup>105</sup>

However, independently from the MSAPA, a separate working group of the Uniform Law Commission undertook to craft a uniform law on mediation.<sup>106</sup> The UMA was adopted in 2003.<sup>107</sup> It contains express authority for the government to mediate.<sup>108</sup> Key provisions include section 2, subsection 6, “[d]efinitions,” which defines a “person” as including a government or governmental subdivision, agency, or instrumentality.<sup>109</sup> Subsection 7 defines “proceeding” to include “administrative” or “other adjudicative process.”<sup>110</sup> Section 3, “[s]cope,” indicates that the UMA “applies to a mediation in which . . . the mediation parties are required to mediate by . . . administrative agency rule or . . . referred . . . by . . . [an] administrative agency.”<sup>111</sup> The UMA has been enacted by a dozen or more states.<sup>112</sup>

101. *Id.*

102. *See, e.g., supra* notes 65–66 and accompanying text (containing statutory language from Florida and Texas state statutes).

103. MODEL STATE ADMIN. PROCEDURE ACT § 403 (UNIF. LAW COMM’N 2010).

104. *See id.*

105. *See id.*

106. *Mediation Act Summary*, UNIF. L. COMM’N, <http://www.uniformlaws.org/ActSummary.aspx?title=Mediation%20Act> (last visited Aug. 12, 2016).

107. *See generally* UNIFORM MEDIATION ACT (NAT’L CONF. COMM’N ON UNIF. STATE LAWS 2003), [http://www.uniformlaws.org/shared/docs/mediation/uma\\_final\\_03.pdf](http://www.uniformlaws.org/shared/docs/mediation/uma_final_03.pdf).

108. *See generally id.*

109. *Id.* § 2.

110. *Id.*

111. *Id.* § 3.

112. *Enactment Status Map*, UNIF. L. COMM’N, <http://www.uniformlaws.org/Act.aspx?title=Mediation%20Act> (last visited Aug. 12, 2016) (noting that Hawaii, Indiana, Illinois, Iowa, Nebraska, New Jersey, Ohio, South Dakota, Utah, Vermont,

The Uniform Law Commission's current MSAPA still contains significant gaps regarding collaborative governance at the state level.<sup>113</sup> Administrative law authorizes, and sometimes even requires, public participation, but it usually does not define it.<sup>114</sup> Generally, administrative law lacks express authority for dialogue and deliberation.<sup>115</sup> It also lacks express authority for collaborative public or network governance in the major, cross-cutting model APA. The absence of express authority acts as a barrier to innovation, even though there is a reasonable basis to imply agency authority. Agencies can probably use the various participatory-, deliberative-, collaborative-, and consensus-based processes that fall under the umbrella term "collaborative governance" from an agency's inherent powers and APAs.

#### IV. MINNESOTA ADMINISTRATIVE LAW AND COLLABORATIVE GOVERNANCE

The Hamline University School of Law was a moving force in the state of Minnesota through previous symposia on collaborative governance.<sup>116</sup> This section will examine the current state of Minnesota statutory law on public engagement as a critical element of collaborative governance.<sup>117</sup> First, it will analyze specific authorities or requirements for public participation.<sup>118</sup> Second, it will consider the Minnesota APA.<sup>119</sup> The review of the Open

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Washington, and Washington D.C. have all enacted the Uniform Mediation Act).

113. See generally UNIFORM MEDIATION ACT (NAT'L CONF. COMM'N ON UNIF. STATE LAWS 2003), [http://www.uniformlaws.org/shared/docs/mediation/uma\\_final\\_03.pdf](http://www.uniformlaws.org/shared/docs/mediation/uma_final_03.pdf).

114. See, e.g., *infra* note 130 and accompanying text (providing an example of a state statute that mentions public participation without defining it).

115. But see Governmental Dispute Resolution Act, UTAH CODE ANN. § 63G-5-102 (West, Westlaw current through 2015 1st Special Sess.) (containing provisions for policy dialogues).

116. See Symposium, *Stop, Collaborate and Listen: The Policy of Collaborative Governance, Citizen Participation, and Innovation and Redesign in Minnesota*, HAMLINE UNIV. SCH. L. (Mar. 16, 2012), <http://mitchellhamline.edu/journal-of-public-law-and-policy/journal-of-public-law-and-policy-symposia/>. An early version of this analysis was presented by Amsler (then Bingham) at the 2012 symposium.

117. See *infra* Sections IV.A.–B.

118. See *infra* Section IV.A.

119. See *infra* Section IV.B.

Meetings Law is deferred to the discussion of possible amendments to the Minnesota code.<sup>120</sup>

A. *Specific Language on Public Participation in the Minnesota Statutes*

In Hamline University School of Law's previous symposium issue on collaborative governance, participants briefly addressed the legal framework for public engagement in Minnesota, using examples of state statutes expressly requiring citizen participation at the Public Utilities Commission and under the Regional Development Act of 1969.<sup>121</sup> These illustrate how legislatures favoring the general policy of public engagement can graft specific requirements or authority onto an agency's enabling statute, much like the over two hundred examples in the U.S. Code for specific federal agencies that were previously mentioned.<sup>122</sup> However, special purpose statutes for public engagement generally have limited applicability.<sup>123</sup>

Similar to the U.S. Code, Minnesota statutes contain little detail about public participation, except with regard to notice and comment in rulemaking. A search of the state code for the word "public" within two words of any form of the words "participate" or "participation" yielded 106 results.<sup>124</sup> These results generally contained no definition of public participation.<sup>125</sup> Instead, they contained a general reference to public participation in different contexts, such as long-range strategic planning,<sup>126</sup> finance, and budgeting.<sup>127</sup>

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120. See *infra* Part VI.

121. See generally Don Reeder et al., *An Effective Model for Public Participation Efforts in Developing Sound Public Policy: The League of Minnesota Cities' Cities, Services & Funding Project*, 34 HAMLINE J. PUB. L. & POL'Y 10 (2012).

122. See *supra* text accompanying note 41; Bingham, *Next Generation*, *supra* note 26, at 297–356.

123. MODEL STATE ADMIN. PROCEDURE ACT § 2 (UNIF. LAW COMM'N 1961) (providing an example of a statute limiting the scope of the public participation).

124. This search was conducted in Lexis-Nexis on March 18, 2016. Many of the hits had nothing to do with public engagement. See, e.g., MINN. STAT. § 11A.14 (2014) (combined investment funds); *id.* § 11A.17 (2014 & Supp. 2015) (public retirement program funding); *id.* § 62E.15 (2014) (health plans); *id.* § 174.24 (public transit).

125. See *supra* note 124 and accompanying text.

126. MINN. STAT. § 4A.01 (2014).

127. *Id.* § 16A.055.

There are references to public participation in agencies' express statutory authorities for rulemaking, generally taking the form of authority to "use technology where appropriate to increase agency productivity, improve customer service, increase public access to information about government, and increase *public participation* in the business of government."<sup>128</sup> While this is not an exclusive list, there are simple references to public participation in various forms of recreation statutes,<sup>129</sup> in relation to developing policy regarding the environment,<sup>130</sup> and in waste management statutes.<sup>131</sup> There is a more detailed reference to public and stakeholder participation pertaining to water pollution control<sup>132</sup>

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128. See MINN. STAT. § 16A.055 (2014), subdiv. 6 (emphasis added); *see also, e.g., id.* § 16B.04 (administration); *id.* § 17.03 (agriculture); *id.* § 43A.04 (state personnel management); *id.* § 45.012 (commerce); *id.* § 84.027 (2014 & Supp. 2015) (natural resources); *id.* § 116.03 (2014 & Supp. 2015) (pollution control); *id.* § 116J.011 (2014) (economic development and planning); *id.* § 120A.03 (education); *id.* § 135A.052 (postsecondary education); *id.* § 144.05 (health); *id.* § 174.02 (transportation); *id.* § 175.001 (labor and industry); *id.* § 190.09 (military forces); *id.* § 196.05 (veterans); *id.* § 216A.07 (public utilities); *id.* § 241.01 (corrections); *id.* § 245.03 (2014 & Supp. 2015) (human services); *id.* § 270C.03 (2014) (revenue); *id.* § 299A.01 (public safety); *id.* § 363A.06 (human rights).

129. *Id.* § 87A.03, subdiv. 1 ("[E]xpand or increase its membership or opportunities for *public participation* related to the primary activity as a shooting range." (emphasis added)); *see also id.* § 89A.06, subdiv. 2 (forest resources) ("[I]dentify and facilitate opportunities for *public participation* in landscape planning and coordination efforts in the region." (emphasis added)); *id.* § 97C.001, subdiv. 1 (fishing) ("The commissioner shall by rule establish methods and criteria for public initiation of experimental waters designation and for *public participation* in the evaluation of the waters designated." (emphasis added)). There are also a number of similar provisions related to watersheds. *See, e.g., id.* § 103B.231, subdiv. 6 ("[M]inimum requirements for the content of watershed plans and plan amendments, including *public participation* process requirements for amendment and implementation of watershed plans." (emphasis added)); Great Lakes Compact, MINN. STAT. § 103G.801 (2014).

130. MINN. STAT. § 114C.01 (2014) (providing in part—"increase *public participation* and encourage stakeholder consensus in the development of innovative environmental regulatory methods and in monitoring the environmental performance of projects under this chapter" (emphasis added)). *See id.* § 116D.10.

131. *Id.* § 115A.1320.

132. *Id.* § 114D.35, subdiv. 1 (emphasis added) ("[The] Pollution Control Agency shall make reasonable efforts to provide timely information to the public and to stakeholders about impaired waters that have been identified by the agency. The agency shall seek broad and early *public* and stakeholder *participation* in scoping the activities necessary to develop a TMDL, including the scientific

and electric power plant siting, which refers to a “broad spectrum of citizen participation.”<sup>133</sup> There is also more detail as to public participation related to nuclear waste.<sup>134</sup> The legislature has, on occasion, urged agencies to develop rules on public participation<sup>135</sup> and has mandated public meetings.<sup>136</sup> There are few specific references to local units of government, although there is one reference to county government in connection with information in libraries and with emergency management,<sup>137</sup> and another with reference to airports.<sup>138</sup>

It is interesting that the only statutory definition of public participation this word search turned up was in the same portion of the code related to the judiciary: “‘Public participation’ means speech or lawful conduct that is genuinely aimed in whole or in part at procuring favorable government action.”<sup>139</sup> Ironically, the

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models, methods, and approaches to be used in TMDL development, and to implement restoration pursuant to section 114D.15, subdivision 7.” (emphasis added)).

133. MINN. STAT. § 216E.08, subdiv. 2 (2014) (“The commission shall adopt broad spectrum citizen participation as a principal of operation. The form of *public participation* shall not be limited to public hearings and advisory task forces and shall be consistent with the commission’s rules and guidelines as provided for in section 216E.16.” (emphasis added)).

134. *See id.* § 116C.721 (referring only generally to informational meetings and notice even though the entire section has the words “public participation” in the title).

135. *Id.* § 216E.16 (“The commission, in order to give effect to the purposes of this chapter, may adopt rules consistent with this chapter, including promulgation of site and route designation criteria, the description of the information to be furnished by the utilities, establishment of minimum guidelines for *public participation* in the development, revision, and enforcement of any rule, plan, or program established by the commission, procedures for the revocation or suspension of a site or route permit, and the procedure and timeliness for proposing alternative routes and sites.” (emphasis added)).

136. *Id.* § 216G.05 (referring to gas pipelines).

137. *Id.* § 299K.06. There is also a reference to cities allowing the public to participate in wine tasting, but that seems off point. *See id.* § 340A.404 (2014 & Supp. 2015).

138. *Id.* § 473.621 (2014).

139. MINN. STAT. § 554.01 (2014). Providing:

Subdiv. 1. *Scope*. The definitions in this section apply to this chapter.

Subdiv. 2. *Government*. “Government” includes a branch, department, agency, official, employee, agent, or other person with authority to act on behalf of the federal government, this state, or any political subdivision of this state, including municipalities and their boards, commissions, and departments, or other public authority.

only express language about “protection of citizens to participate in government” applies only to the judicial branch.<sup>140</sup>

*B. Minnesota’s Administrative Procedure Act*

The following discussion focuses only on those parts of the Minnesota APA and chief administrative law judge rules under it that relate to the public’s voice in quasi-legislative processes like rulemaking and quasi-judicial processes in contested cases. State administrative procedure acts apply across agency boundaries and represent the basic rules establishing the relationship between agencies and the public.

Minnesota has language in its APA that supports voice processes across the policy continuum that enable collaborative governance; it has language about public participation, voice and mediation in rulemaking, and dispute resolution. In section 14.001 “Statement of Purpose,” the Minnesota Administrative Procedure Act (MAPA) provides that its purposes include “to increase public accountability of administrative agencies,” “to increase public access to governmental information,” and “to increase public participation in the formulation of administrative rules.”<sup>141</sup> The definition of agency is limited to a “state officer, board,

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Subdiv. 3. *Judicial claim; claim.* “Judicial claim” or “claim” includes any civil lawsuit, cause of action, claim, cross-claim, counterclaim, or other judicial pleading or filing seeking damages for an alleged injury. “Judicial claim” does not include a claim solely for injunctive relief.

Subdiv. 4. *Motion.* “Motion” includes any motion to dismiss, motion for summary judgment, or any other judicial pleading filed to dispose of a judicial claim.

Subdiv. 5. *Moving party.* “Moving party” means any person on whose behalf the motion described in section 554.02, subdivision 1, is filed seeking dismissal of an action under this chapter.

Subdiv. 6. *Public participation.* “Public participation” means speech or lawful conduct that is genuinely aimed in whole or in part at procuring favorable government action.

Subdiv. 7. *Responding party.* “Responding party” means any person against whom a motion described in section 554.02, subdivision 1, is filed.

*Id.*

140. MINN. STAT § 554.02 (2014) (“This section applies to any motion in a judicial proceeding to dispose of a judicial claim on the grounds that the claim materially relates to an act of the moving party that involves *public participation*.” (emphasis added)). Moreover, this was among the last sections in the search.

141. *Id.* § 14.001.

commission, bureau, division, department, or tribunal . . . having a statewide jurisdiction and authorized by law to make rules or to adjudicate contested cases.”<sup>142</sup>

Section 14.06(a) mandates that:

Each agency shall adopt rules, in the form prescribed by the revisor of statutes, setting forth the nature and requirements of all formal *and informal procedures* related to the administration of official agency duties *to the extent that those procedures directly affect the rights of or procedures available to the public.*<sup>143</sup>

Like similar language in the MSAPA, this provision opens the door to agency innovation in public engagement. Through rulemaking,<sup>144</sup> each agency could adopt formal and informal procedures related to the rights of the public to participate, subject to legislative committee authority over rule adoption,<sup>145</sup> legislative approval depending on cost impacts,<sup>146</sup> impacts on local government,<sup>147</sup> and statements of need and reasonableness of the rule.<sup>148</sup> Section 14.09 authorizes “[a]ny person” to “petition an agency requesting the adoption, amendment, or repeal of any rule.”<sup>149</sup>

Arguably, this provision authorizes members of the public to petition any state agency to adopt or amend rules about public engagement to expand participation.<sup>150</sup> The Minnesota Office of Administrative Hearings has adopted regulations regarding a petition for rulemaking,<sup>151</sup> but it is silent on public hearing or public engagement in the process of deciding on this kind of petition. The public has the right to petition for rulemaking when the agency “is enforcing or attempting to enforce a policy,

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142. *Id.* § 14.02.

143. *Id.* § 14.06 (emphasis added).

144. Similarly, section 14.091 allows units of local government to petition to amend or repeal a rule, but that section is limited by comparison, requiring that a petitioner meet a certain burden of proof. *Id.* § 14.091(a) (“The petition . . . must demonstrate that one of the following has become available since the adoption of the rule . . .”).

145. *Id.* § 14.126.

146. *Id.* § 14.127, subdiv. 3.

147. *Id.* § 14.128.

148. *Id.* § 14.131.

149. *Id.* § 14.09.

150. *See id.*

151. MINN. R. § 1400.2040 (2014).

guideline, bulletin, criterion, manual standard, or similar pronouncement as though it were a duly adopted rule.”<sup>152</sup>

Public participation in rulemaking is provided for under section 14.14 in the form of notice<sup>153</sup> and comment.<sup>154</sup> It requires or permits public hearings under certain circumstances “affording all affected interests an opportunity to participate.”<sup>155</sup> Under section 14.14, subdivision 2a, “interested persons may present written and oral evidence.”<sup>156</sup> If the agency adopts a rule, it “shall give notice to all persons who requested to be informed.”<sup>157</sup> Members of the public may request a public hearing if twenty-five or more people submit a written request during the thirty-day comment period.<sup>158</sup>

The agency must keep an official rulemaking record that includes records of “all written petitions, and all requests, submissions, or comments received” by the agency or administrative law judge (ALJ).<sup>159</sup> It must also keep a public rulemaking docket where the public may inspect written comments, the names of people who have made written requests, and other information about rulemaking.<sup>160</sup>

There are exemptions from rulemaking procedures for good cause<sup>161</sup> and also expedited procedures.<sup>162</sup> There is public access through publication in the state register<sup>163</sup> and in published

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152. MINN. STAT. § 14.381, subdiv. 1(a) (2014).

153. *Id.* § 14.14, subdiv. 1a.

154. *Id.* § 14.14, subdiv. 2a.

155. *Id.* § 14.14, subdiv. 1a. Section 14.14, subdivision 1a permits people to register with the agency to receive notice of rule proceedings. *Id.* Section 14.22 also addresses notice to the public of intention to adopt a rule without a hearing or repeal one, and allows twenty-five or more persons to submit a written request for a public hearing within the thirty-day comment period. *Id.* § 14.22, subdiv. 1(a)(3).

156. *Id.* § 14.14, subdiv. 2a.

157. *Id.* § 14.16, subdiv. 1. Notice is also given through publication in the Minnesota State Register. *Id.* § 14.18, subdiv. 1.

158. *Id.* § 14.25 (stating that requests for a hearing may be withdrawn); *id.* § 14.25, subdiv. 2 (“If no hearing is required, the agency shall submit [the rule] to an administrative law judge assigned by the chief administrative law judge.”); *id.* § 14.26, subdiv. 1.

159. *Id.* § 14.365.

160. *Id.* § 14.366.

161. *Id.* § 14.388.

162. *Id.* § 14.389.

163. *Id.* § 14.46.



compiled rules.<sup>164</sup> In general, these provisions do not provide for deliberative and participatory engagement; they provide for basic notice and comment in rulemaking.

Rulemaking is generally a quasi-legislative proceeding.<sup>165</sup> Historically, mediation was not used in rulemaking.<sup>166</sup> At the federal level, there may be negotiated rulemaking with the assistance of facilitators.<sup>167</sup> The line between mediation and facilitation is fuzzy. To oversimplify, facilitation is a process in which the neutral helps a large group manage its conversation, for example, over conflicts in policy preferences.<sup>168</sup> Mediation is a form of dispute resolution; it is a deliberative process associated with helping specific disputants negotiate a settlement to their dispute.

However, there are interesting possibilities through Minnesota's Office of Administrative Hearings. Section 14.51 of the Minnesota statutes provides that the:

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164. *Id.* § 14.47.

165. Bingham, *Next Generation*, *supra* note 26, at 306.

166. The Federal Mediation and Conciliation Service (FMCS) was created in the early 1900s to provide mediation and arbitration service in labor relations. *Our History: A Timeline of Events in Modern American Labor Relations*, FED. MEDIATION & CONCILIATION SERV., <https://www.fmcs.gov/aboutus/our-history/> (last visited Aug. 12, 2016). Contemporary mediation and ADR systems are an outgrowth of mediation and arbitration in collective bargaining. *Id.* The FMCS reports it first applied mediation to environmental conflict in 1975, pursuant to federal legislation. *Id.* It reports that it convened one of the first regulatory negotiations, now called negotiated rulemaking, in 1983. *Id.*

167. Negotiated Rulemaking Act of 1996, 5 U.S.C. § 562 (2014) (providing that “‘facilitator’ means a person who impartially aids in the discussions and negotiations among the members of a negotiated rulemaking committee to develop a proposed rule”). “Conduct of committee activity” provides:

(d) Duties of Facilitator. A facilitator approved or selected by a negotiated rulemaking committee shall:

- (1) chair the meetings of the committee in an impartial manner;
- (2) impartially assist the members of the committee in conducting discussions and negotiations; and
- (3) manage the keeping of minutes and records as required under section 10(b) and (c) of the Federal Advisory Committee Act, except that any personal notes and materials of the facilitator or of the members of a committee shall not be subject to section 552 of this title.

5 U.S.C. §566 (2014).

168. ROGER SCHWARZ, *THE SKILLED FACILITATOR: A COMPREHENSIVE RESOURCE FOR CONSULTANTS, FACILITATORS, MANAGERS, TRAINERS, AND COACHES* 5 (2d ed. 2002).

[C]hief administrative law judge shall adopt rules to govern: (1) the procedural conduct of all hearings relating to both rule adoption, amendment, suspension or repeal hearings, contested case hearings, and workers' compensation hearings, and to govern the conduct of voluntary mediation sessions for rulemaking and contested cases other than those within the jurisdiction of the Bureau of Mediation Service; and (2) the review of rules adopted without a public hearing.<sup>169</sup>

This authority suggests possibilities for more deliberative processes than simple notice and comment rulemaking.<sup>170</sup> Although the section mostly addresses quasi-adjudicative processes like administrative law judge hearings in contested cases, it also expressly opens the door to the Minnesota Chief Administrative Law Judge adopting rules about the role of a mediator in rulemaking.<sup>171</sup> Mediators can act as facilitators; they function as third parties and may move between the roles in large group processes.

Moreover, the chief administrative law judge has the authority to enter into contracts with political subdivisions of the state for ALJs and reporters for "administrative proceedings or informal dispute resolution."<sup>172</sup> This suggests possible roles for administrative law judges in collaborative governance and more specifically deliberative public engagement in local government.

For contested cases at the state agency level, agencies may enter into "a written agreement to submit all issues raised to arbitration by an administrative law judge"<sup>173</sup> As an adjudicatory procedure, arbitration is distinct from mediation and informal dispute resolution; nevertheless, these three different instances of express authority to use alternative or appropriate dispute resolution represent a legal framework supporting forms of collaborative governance. Section 14.59 provides additional support for this conclusion: "Informal disposition may also be made of any contested case by arbitration, stipulation, agreed settlement, consent order or default."<sup>174</sup> While it is peculiar to see

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169. MINN. STAT. § 14.51 (2014).

170. *See id.*

171. MINN. STAT. § 14.51 (2014).

172. *Id.* § 14.55.

173. *Id.* § 14.57, subdiv. (b).

174. *Id.* § 14.59.

mediation expressly authorized in one section but not included in another, the line between agreed settlement and one in which a mediator helps the parties negotiate an agreement is vanishingly thin.

There are also interesting questions raised in rule 1400.2080 “Notice of Proposed Rule.”<sup>175</sup> This section directs agencies as to what they must include in a notice of a proposed rule when there is and is not going to be a public hearing.<sup>176</sup> It requires that when there is a notice of a hearing, the notice must state not only the time, date, and place of the hearing, but also “that all interested persons will have an opportunity to participate” and “how interested persons may present their views at the hearing.”<sup>177</sup> This suggests that there might be more than one way for the public to present their views and that agencies have discretion to structure the hearing in multiple ways.<sup>178</sup> This again may open the door to more innovative and participatory public engagement in each state agency. In rulemaking hearings, rule 1400.2210, Conduct of Hearing, provides some restrictions by requiring, “[a]ll persons who present evidence or ask questions must register whether or not they speak at the hearing.”<sup>179</sup> It also requires names and addresses.<sup>180</sup> It spells out opportunities for questions, members of the public presenting statements and evidence, judge questions, agency evidence and responses, court reporters, and transcripts.<sup>181</sup> Rule 1400.2230 governs written comments after the hearing, time limits, and responses.<sup>182</sup> All of these restrictions may affect whether members of the public are willing to participate. Those who have concerns about their names becoming part of a public record may be unwilling.

Rule 1400.2450 addresses mediation; it provides:

An agency may ask the chief judge to assign a judge to be a neutral party assisting in mediating or negotiating a resolution to disputes relating to proposed rules. The chief judge must assign a judge and notify the agency of

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175. MINN. R. 1400.2080 (2013).

176. *Id.*

177. *Id.*

178. *See id.*

179. MINN. R. at 1400.2210.

180. *Id.*

181. *Id.*

182. MINN. R. 1400.2230.

the assignment within ten days after receiving the agency's written request.<sup>183</sup>

In addition, the rule provides for confidentiality (subpart 3), establishing procedures and guidelines for mediation sessions by agreement of all participants (subpart 4), and subsequent sessions (subpart 5).<sup>184</sup> Subpart 6, "Termination," interestingly provides for either termination by the agency or when all the participants sign "an agreement resolving the disputed issues."<sup>185</sup>

The chief administrative law judge rules also address contested cases or traditional adjudications.<sup>186</sup> It authorizes informal disposition of a contested case or issue "by stipulation, agreed settlement, or consent order at any point in the proceedings."<sup>187</sup> It authorizes settlements by the parties on their own or through mediation procedures<sup>188</sup> or settlement conferences.<sup>189</sup> There is a separate section authorizing mediation as a "voluntary process where parties to a dispute jointly explore and resolve all or a part of their differences with the assistance of a neutral person."<sup>190</sup> The process is voluntary,<sup>191</sup> but it appears that only the agency may terminate mediation unilaterally; otherwise, all parties must either agree to terminate or reach a settlement.<sup>192</sup>

In contested cases, people may intervene as a party through a petition;<sup>193</sup> more significantly for public engagement, an administrative law judge may authorize "participation by the public" without a petition.<sup>194</sup> The judge may authorize testimony, receiving exhibits, questioning witnesses, and other participation.<sup>195</sup>

This review of Minnesota's APA suggests that there are possibilities to use the existing legal infrastructure to build more participatory and deliberative processes into state agency rules

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183. MINN. R. 1400.2540 subp. 1.

184. *Id.*

185. *Id.*

186. MINN. R. . at 1400.5010–1400.8400.

187. MINN. R. 1400.5900.

188. *Id.*

189. MINN. R. 1400.6550; MINN. R. 1400.6500 (addressing prehearing conferences).

190. MINN. R. 1400.5950.

191. *Id.* at 1400.5950, subp. 2.

192. *Id.* at 1400.5950, subp. 5.

193. MINN. R. 1400.6200.

194. *Id.* at 1400.6200, subp. 5.

195. *Id.*

through their express rulemaking authority on public participation. It may also be possible to build more public engagement into local government processes through contract with the chief administrative law judge. We can improve the understanding of these possibilities with a review of public participation and engagement, including its main types, outcomes, and chief design considerations.

#### V. THE VARIETIES, OUTCOMES, AND DESIGNS OF PUBLIC ENGAGEMENT

Public engagement “is an umbrella term that describes the activities by which people’s concerns, needs, interests, and values are incorporated into decisions and actions on public matters and issues.”<sup>196</sup> Under that umbrella are both indirect and direct participation activities.<sup>197</sup>

In indirect participation, individuals select an agent who decides and acts for them, whereas in direct participation, individuals are personally involved and actively engaged in providing input, making decisions, and solving problems.<sup>198</sup> The focus here is on direct participation, which can be broken down further into three main categories—conventional, thin, and thick—each of which encompasses a wide variety of processes and activities that share common features.<sup>199</sup>

In this section, we first review the three main categories of direct public engagement.<sup>200</sup> We then briefly examine the outcomes of these forms of direct public engagement.<sup>201</sup> We conclude the section with a discussion about the important design decisions

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196. NABATCHI & LEIGHNINGER, *supra* note 2, at 14; *see also* Nabatchi & Amsler, *supra* note 51, at 63S–88S.

197. NABATCHI & LEIGHNINGER, *supra* note 2, at 14; *see also* Nabatchi & Amsler, *supra* note 51, at 63S–88S.

198. NABATCHI & LEIGHNINGER, *supra* note 2, at 14; Nabatchi & Amsler, *supra* note 51, at 65S.

199. *See generally* NABATCHI & LEIGHNINGER, *supra* note 2; Micah Sifry, *Civic Tech and Engagement: Announcing a New Series on What Makes It ‘Thick’*, TECHPRESIDENT (July 24, 2014), <http://techpresident.com/news/25204/civic-tech-and-engagement-announcing-new-series-what-makes-it-thick>; Ethan Zuckerman, *Beyond ‘The Crisis in Civics’—Notes From My 2013 DML Talk*, ETHANZUCKERMAN.COM (Mar. 26, 2013), [www.ethanzuckerman.com/blog/2013/03/26/beyond-the-crisis-in-civics-notes-from-my-2013-dml-talk/](http://www.ethanzuckerman.com/blog/2013/03/26/beyond-the-crisis-in-civics-notes-from-my-2013-dml-talk/).

200. *See infra* Section V.A.

201. *See infra* Section V.B.

public officials need to make when using direct public engagement.<sup>202</sup>

A. *The Three Main Types of Direct Public Engagement*

*Conventional participation* is the oldest and most common form of direct participation.<sup>203</sup> It describes most of the meetings or hearings held by public bodies, such as school boards, zoning commissions, city councils, congressional representatives, state and federal agencies, and other government entities.<sup>204</sup> As noted above, many conventional processes, and their designs, are prescribed by law; thus, one can identify some fairly common elements, including a reliance on: (1) advance notification, (2) “an audience-style room setup, with decision-makers behind a table (often on a dais) at the front of the room and citizens in chairs laid out in rows,”<sup>205</sup> (3) a strictly followed preset agenda that defines the topics for discussion,<sup>206</sup> and (4) public comment segments, during which citizens have two to three minutes at an open microphone to address their elected officials.<sup>207</sup>

*Thin participation* refers to a variety of fast, easy, and convenient approaches that allow individuals (sometimes in large numbers) to affiliate with a cause, submit ideas, indicate preferences, or otherwise receive or provide information in fast and convenient ways.<sup>208</sup> Thin participation can occur face-to-face or by telephone (e.g., with surveys, petitions, and polls), as well as online (e.g., through crowdsourcing, crowdfunding, ideation, mapping, social media, serious games, and wikis).<sup>209</sup>

Although there is more variety among thin participation activities than among conventional or thick processes, all thin activities provide individuals with opportunities to express their ideas, opinions, or concerns in ways that have (1) short time commitments, (2) less stringent information requirements, and (3)

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202. See *infra* Section V.C.

203. NABATCHI & LEIGHNINGER, *supra* note 2, at 21.

204. *Id.* at 21–22.

205. Tina Nabatchi et al., *Using Public Participation to Enhance Citizen Voice and Promote Accountability*, in JAMES L. PERRY & ROBERT K. CHRISTENSEN, *HANDBOOK OF PUBLIC ADMINISTRATION* 137–50, 138 (3d ed. 2015).

206. *Id.*

207. *Id.*

208. NABATCHI & LEIGHNINGER, *supra* note 2, at 17–21.

209. *Id.*

fewer emotional burdens.<sup>210</sup> While people participate as individuals, those who take advantage of thin opportunities are often motivated by some larger movement or cause.<sup>211</sup> Moreover, although thin participation activates individuals, when sufficient numbers of people are involved, thin participation can have real impacts,<sup>212</sup> for example when activities “go viral” on the Internet and attract huge numbers of people and mass media attention.

*Thick participation* enables large numbers of people working in small groups (usually face-to-face, but sometimes online) to discuss, learn, decide, and act together.<sup>213</sup> There are numerous examples of face-to-face processes for thick participation, including for example, appreciative inquiry, citizens juries, national issues forums, planning charrettes, and study circles, as well as a growing number of online platforms and tools for thick participation, including Engagement HQ, MetroQEst, and Zilino.<sup>214</sup>

The most significant feature of thick participation, and one that unites these various processes, is the focus on deliberation, wherein groups engage in a thoughtful, open, and accessible discussion about information, views, experiences, and ideas, and seek to make a decision or judgment based on facts, data, values, emotions, and other less technical considerations.<sup>215</sup> Other common features of thick participation include: (1) proactive, network-based recruitment, (2) small-group facilitation, (3) discussion sequencing, (4) issue framing, and (5) decision-making or action planning. Although thick participation is the most meaningful and powerful of the three forms of direct participation, it is also the most intensive, time-consuming, and least common.<sup>216</sup>

As with conventional participation, both thin and thick forms of participation have strengths and weaknesses.<sup>217</sup> For example, thin participation requires little of participants; it is fast, easy, and convenient, which allows for the rapid collection of concerns,

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210. *Id.*

211. Archon Fung et al., *Six Models for the Internet + Politics*, 15 INT’L STUD. REV. 1, 30–47 (2013).

212. *Id.*

213. NABATCHI & LEIGHNINGER, *supra* note 2, at 14–17.

214. *Id.*

215. See JOHN GASTIL, POLITICAL COMMUNICATION AND DELIBERATION 8–10 (2008).

216. NABATCHI & LEIGHNINGER, *supra* note 2, at 14–17.

217. *Id.*

ideas, and other data and input.<sup>218</sup> In contrast, while not fast or easy, thick participation processes enable participants to learn deeply about an issue or set of issues, as well as to better understand other perspectives, which can greatly improve the quality of the input.<sup>219</sup>

However, with some exceptions, thin and thick activities tend to have limited impacts because they are seldom incorporated into larger plans or systems for public engagement.<sup>220</sup> One promising direction is to combine the best features of thick and thin participation, especially in ways that are replicable, sustainable, and embedded in communities.

### *B. The Benefits and Drawbacks of Direct Public Engagement*

Advocates suggest many benefits of direct public engagement, including individual level benefits (e.g., participants become educated about problems, develop civic skills and dispositions, and become more active in politics and in their communities), community level benefits (e.g., communities develop social capital, the capacity to understand and address problems, and better individual and organizational leadership), and institutional level benefits (e.g., government institutions make better policy, experience easier implementation, and take more effective public action).<sup>221</sup> However, research suggests that not all direct participation processes are equally able to generate these kinds of outcomes.<sup>222</sup> The disparities in findings give support to critics' claims about the drawbacks of public participation, including potential harms to the public, government officials, policies, and governance.<sup>223</sup>

Clearly, advocates and critics of participation do not see eye to eye. However, this is because they often employ mismatched definitions and ignore salient variations in process design. In other

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218. *Id.*

219. *Id.*

220. *Id.*

221. See generally Nabatchi, DEMOCRACY IN MOTION, *supra* note 2 (providing a broad discussion of these and other potential benefits).

222. NABATCHI & LEIGHNINGER, *supra* note 2, at 22–25.

223. See generally Loren Collingwood & Justin Reedy, *Listening and Responding to Criticisms of Deliberative Civic Engagement*, in Nabatchi, DEMOCRACY IN MOTION, *supra* note 2, at 233–59.



words, they do not examine separately the outcomes of different categories of direct participation processes.

Nabatchi and Amsler attempt to parse out the outcomes of different types of direct public engagement.<sup>224</sup> They find that “while there is a rich literature about the outcomes of direct public engagement, the research is generally thin and unsystematic and is often disconnected from attempts to improve practice.”<sup>225</sup> Despite limitations in the extant research, not the least of which is the general disregard for explaining the contexts and designs of the engagement processes being evaluated, they find that empirical studies show both benefits and drawbacks of direct public engagement for individual participants, communities, and government and governance.<sup>226</sup> Moreover, they suggest that in-person deliberative public engagement (i.e., thick participation) seems to generate better outcomes than both online engagement (i.e., thin participation) and traditional engagement (i.e., conventional participation).<sup>227</sup>

Nabatchi and Leighninger reach similar conclusions, albeit through a different route.<sup>228</sup> Specifically, they suggest that “good” public engagement means treating citizens like adults, that is, conferring upon citizens the respect, recognition, and responsibility that typify an adult relationship. For example, by providing factual information, using sound group process techniques, giving people a chance to tell their stories, providing choices, giving participants a sense of political legitimacy, and supporting people to take action in a variety of ways.<sup>229</sup>

They then analyze each category of direct public engagement using empirical literature, and argue that thick participation generally features many of the attributes of an adult-adult relationship, that thin participation sometimes features the attributes of an adult-adult relationship, and that conventional participation offers few of the attributes of an adult relationship.<sup>230</sup>

Although each pair of authors takes a different approach to assessing the outcomes of direct public engagement, both reach

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224. Nabatchi & Amsler, *supra* note 51, at 63S–88S.

225. *Id.* at 80S.

226. *Id.* at 74S–80S.

227. *Id.* at 80S.

228. NABATCHI & LEIGHNINGER, *supra* note 2, at 22–28.

229. *Id.* at 25–29.

230. *Id.*

the same conclusion: the design of public engagement matters.<sup>231</sup> Specifically, design choices affect who attends, how prepared they are, how much they know and learn, with whom they interact, how they participate, and likely what they experience.<sup>232</sup> This section on direct public engagement concludes with a discussion of the most important decisions public officials need to make when designing direct public engagement processes.<sup>233</sup>

### C. *Designing Public Engagement*

Even within the categories of conventional, thin, and thick participation, specific process designs can vary widely.<sup>234</sup> Among the most obvious variations are: general purpose and objectives, size, participant recruitment, participation mechanism and methodology, interaction mode, communication plan, participant preparation, locus of action, specificity of recommendations, recurrence and iteration, and connection to policy and decision-making.<sup>235</sup> The wealth of options can make it difficult for leaders to know how to best design a participatory opportunity. Here, we draw

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231. Nabatchi & Amsler, *supra* note 51, at 80S; NABATCHI & LEIGHNINGER, *supra* note 2, at 287–302.

232. Nabatchi & Amsler, *supra* note 51, at 80S; NABATCHI & LEIGHNINGER, *supra* note 2, at 287–302.

233. *See infra* Section V.C.

234. *See generally* NABATCHI & LEIGHNINGER, *supra* note 2, at 14–22; Nabatchi & Amsler, *supra* note 51, at 63S–88S; Lisa Blomgren Bingham, Tina Nabatchi & Rosemary O’Leary, *The New Governance: Practices and Processes for Stakeholder and Citizen Participation in the Work of Government*, 65 PUB. ADMIN. REV. 547, 552–54 (2005); John M. Bryson et al., *Designing Public Participation Processes*, 73 PUB. ADMIN. REV. 23, 23–34 (2012); Archon Fung, *Recipes for Public Spheres: Eight Institutional Design Choices and Their Consequences*, 11 J. POL. PHIL. 338, 338–67 (2003) [hereinafter Fung, *Recipes for Public Spheres*]; Archon Fung, *Varieties of Participation in Complex Governance*, 2006 PUB. ADMIN. REV. (SPECIAL ISSUE) 66, 66–75 (2006); Robert Hoppe, *Institutional Constraints and Practical Problems in Deliberative and Participatory Policy Making*, 39 POL’Y & POL. 163, 163–86 (2011); Tina Nabatchi, *An Introduction to Deliberative Civic Engagement*, in Nabatchi, *DEMOCRACY IN MOTION*, *supra* note 2, at 3–17; Tina Nabatchi, *A Manager’s Guide to Evaluating Citizen Participation*, IBM CTR. FOR BUS. GOV’T (2012), <http://unpan1.un.org/intradoc/groups/public/documents/un-dpadm/unpan048340.pdf>; Tina Nabatchi, *Putting the “Public” Back in Public Values Research: Designing Public Participation to Identify and Respond to Public Values*, 72 PUB. ADMIN. REV. 699, 699–708 (2012) [hereinafter Nabatchi, *Putting the “Public” Back*].

235. *See supra* note 234 and accompanying text (providing more discussion on variations in direct participation).

on Nabatchi and Leighninger to discuss four strategic design questions that officials must answer when they decide to use direct public engagement: (1) Who should participate and how will participants be recruited? (2) How will participants interact with each other and with decision-makers? (3) What information do people need to participate effectively? (4) How will participation impact policy decisions, problem-solving efforts, or other kinds of public action?<sup>236</sup>

Of course, before answering these questions, designers of public participation and engagement must attend to other issues, such as the goals for participation (why participation is needed and the hoped for accomplishments); timing (how quickly a decision needs to be made or an action taken); mandates, laws, rules, and regulations; and system context and organizational conditions (budget, human and other resources, available technologies, and logistical constraints).<sup>237</sup>

They must also consider the level of concern or controversy surrounding the issues being addressed.<sup>238</sup> Some issues have low stakes, where most people are relatively unconcerned and do not have fixed positions; others have high stakes, where many people are very concerned and hold strong positions; and still others are of low stakes to some people, and high stakes to others.<sup>239</sup> In general, a high-stakes issue requires more attention to design than a low-stakes issue.<sup>240</sup>

### 1. *Who Should Participate and How Will Participants Be Recruited?*

These questions reflect central issues in direct public engagement.<sup>241</sup> Getting the “right” people to the table depends not

236. See NABATCHI & LEIGHNINGER, *supra* note 2, at 246–52; Nabatchi & Amsler, *supra* note 51, at 63S–88S; Nabatchi, *Putting the “Public” Back*, *supra* note 234, at 699–708.

237. See Nabatchi, *Putting the “Public” Back*, *supra* note 234, at 699–708; NABATCHI & LEIGHNINGER, *supra* note 2, at 244; Nabatchi & Amsler, *supra* note 51, at 63S–88S.

238. Nabatchi, *Putting the “Public” Back*, *supra* note 234, at 701; NABATCHI & LEIGHNINGER, *supra* note 2, at 244.

239. See Fung, *Recipes for Public Spheres*, *supra* note 234, at 338–67; NABATCHI & LEIGHNINGER, *supra* note 2, at 246; Nabatchi & Amsler, *supra* note 51, at 63S–88S.

240. NABATCHI & LEIGHNINGER, *supra* note 2, at 244–46.

241. Nabatchi, *Putting the “Public” Back*, *supra* note 234, at 705–06; NABATCHI & LEIGHNINGER, *supra* note 2, at 246.

only on what officials are trying to do, but also on how people perceive and are affected by the issue.<sup>242</sup> In general, when the stakes are high and many people are affected, officials need to devote more time and energy to recruitment.<sup>243</sup> There are several approaches to recruitment, which may be used alone or in combination with one or more of the others.<sup>244</sup>

Voluntary self-selection occurs when announcements are broadcast through the media, for example with flyers and newspaper, radio, and website notices.<sup>245</sup> This approach can create “participation bias,” which means that those who attend are not representative of the community in terms of socio-demographic characteristics, political or ideological perspectives, or viewpoints on the issue.<sup>246</sup> Thus, this approach, which is relatively easy and inexpensive, works well for low stakes issues where few people are affected and is most appropriate for conventional and thin participation opportunities that are open to anyone.<sup>247</sup>

However, when the stakes are higher, or when many people are affected, recruitment efforts need to be more intense.<sup>248</sup> In such cases, officials can use proactive, network-based recruitment, sometimes called “targeted demographic recruitment,” which seeks to obtain participants that are more demographically representative of the community.<sup>249</sup> Because this approach relies on

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242. Nabatchi, *Putting the “Public” Back*, *supra* note 234, at 705–06; NABATCHI & LEIGHNINGER, *supra* note 2, at 246; Nabatchi & Amsler, *supra* note 51, at 72S–73S.

243. NABATCHI & LEIGHNINGER, *supra* note 2, at 246.

244. Nabatchi, *Putting the “Public” Back*, *supra* note 234, at 704–05; NABATCHI & LEIGHNINGER, *supra* note 2, at 246–48; Nabatchi & Amsler, *supra* note 51, at 72S–73S.

245. Nabatchi, *Putting the “Public” Back*, *supra* note 234, at 704–05; NABATCHI & LEIGHNINGER, *supra* note 2, at 246–48; Nabatchi & Amsler, *supra* note 51, at 72S–73S.

246. Nabatchi, *Putting the “Public” Back*, *supra* note 234, at 704–05; NABATCHI & LEIGHNINGER, *supra* note 2, at 246–48; Nabatchi & Amsler, *supra* note 51, at 72S–73S.

247. Nabatchi, *Putting the “Public” Back*, *supra* note 234, at 705; NABATCHI & LEIGHNINGER, *supra* note 2, at 246–48; Nabatchi & Amsler, *supra* note 51, at 72S–73S.

248. Nabatchi, *Putting the “Public” Back*, *supra* note 234, at 705; NABATCHI & LEIGHNINGER, *supra* note 2, at 246–48; Nabatchi & Amsler, *supra* note 51, at 72S–73S.

249. Nabatchi, *Putting the “Public” Back*, *supra* note 234, at 705; NABATCHI & LEIGHNINGER, *supra* note 2, at 246–48; Nabatchi & Amsler, *supra* note 51, at 72S–73S.

community networks and relationships of trust, it can be more time and labor intensive.<sup>250</sup> Similarly, random selection, which essentially entails picking participants by lot, can also produce a microcosm of the larger population.<sup>251</sup> This strategy is probably the most resource and time intensive, as it often requires finding a third party to facilitate the collection of population lists.<sup>252</sup>

Both of these recruitment approaches are particularly useful for thick participation processes.<sup>253</sup> Finally, incentives can be added to the recruitment strategy to remove the immediate barriers to participation.<sup>254</sup> Incentives may be monetary (e.g., per diem payments and gift cards) or non-monetary (e.g., food and music), and may also include things like transportation, child care, or translation services.<sup>255</sup>

## 2. *How Will Participants Interact with Each Other and with Decision-Makers?*

Participation leaders should also consider how people will communicate with each other during a direct public engagement opportunity.<sup>256</sup> There are three broad interaction or communication modes—one-way, two-way, and deliberative—although direct engagement opportunities might use different communication modes and different points in time.<sup>257</sup>

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250. Nabatchi, *Putting the “Public” Back*, *supra* note 234, at 705; NABATCHI & LEIGHNINGER, *supra* note 2, at 246–48; Nabatchi & Amsler, *supra* note 51, at 72S–73S.

251. Nabatchi, *Putting the “Public” Back*, *supra* note 234, at 705; NABATCHI & LEIGHNINGER, *supra* note 2, at 246–48; Nabatchi & Amsler, *supra* note 51, at 72S–73S.

252. Nabatchi, *Putting the “Public” Back*, *supra* note 234, at 705; NABATCHI & LEIGHNINGER, *supra* note 2, at 246–48; Nabatchi & Amsler, *supra* note 51, at 72S–73S.

253. Nabatchi, *Putting the “Public” Back*, *supra* note 234, at 704–05; NABATCHI & LEIGHNINGER, *supra* note 2, at 246–48; Nabatchi & Amsler, *supra* note 51, at 72S–73S.

254. Nabatchi, *Putting the “Public” Back*, *supra* note 234, at 705; NABATCHI & LEIGHNINGER, *supra* note 2, at 246–48; Nabatchi & Amsler, *supra* note 51, at 72S–73S.

255. Nabatchi, *Putting the “Public” Back*, *supra* note 234, at 705; NABATCHI & LEIGHNINGER, *supra* note 2, at 246–48; Nabatchi & Amsler, *supra* note 51, at 72S–73S.

256. Nabatchi, *Putting the “Public” Back*, *supra* note 234, at 701–02; NABATCHI & LEIGHNINGER, *supra* note 2, at 248–49; Nabatchi & Amsler, *supra* note 51, at 73S.

257. Nabatchi, *Putting the “Public” Back*, *supra* note 234, at 701–02; NABATCHI &

One-way communication is the unidirectional flow of information between people, and two-way communication is the reciprocal flow of information.<sup>258</sup> Deliberative communication involves the multi-direction flow of information, and usually occurs in small groups that are oriented toward problem-solving.<sup>259</sup>

In general, one- and two-way communication are fast and easy, but they also tend to limit in-depth consideration of perspectives and encourage position-based statements.<sup>260</sup> These communication modes are more commonly found in conventional and thin opportunities, and are most appropriate when the issues at hand are low stakes.<sup>261</sup> In contrast, deliberative communication focuses on participants' interests and can foster in-depth consideration of issues.<sup>262</sup> It is a requirement for thick participation, and although it is labor-intensive and time-consuming, deliberation can foster cooperation and lead to more productive and constructive participation processes.<sup>263</sup>

### 3. *What Information Do People Need to Participate Effectively?*

Research shows that participant input improves when people are given high-quality information<sup>264</sup> that provides context and history, is neutral and objective, and includes all perspectives.<sup>265</sup> Not all participation opportunities require preparatory materials.<sup>266</sup> Whether information is needed, as well as what types of materials

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LEIGHNINGER, *supra* note 2, at 248–49; Nabatchi & Amsler, *supra* note 51, at 73S.

258. Nabatchi, *Putting the "Public" Back*, *supra* note 234, at 701–02; NABATCHI & LEIGHNINGER, *supra* note 2, at 248–49; Nabatchi & Amsler, *supra* note 51, at 73S.

259. Nabatchi, *Putting the "Public" Back*, *supra* note 234, at 701–02; NABATCHI & LEIGHNINGER, *supra* note 2, at 248–49; Nabatchi & Amsler, *supra* note 51, at 73S.

260. Nabatchi, *Putting the "Public" Back*, *supra* note 234, at 701–02; NABATCHI & LEIGHNINGER, *supra* note 2, at 248–49; Nabatchi & Amsler, *supra* note 51, at 73S.

261. Nabatchi, *Putting the "Public" Back*, *supra* note 234, at 701–02; NABATCHI & LEIGHNINGER, *supra* note 2, at 248–49; Nabatchi & Amsler, *supra* note 51, at 73S.

262. Nabatchi, *Putting the "Public" Back*, *supra* note 234, at 701–02; NABATCHI & LEIGHNINGER, *supra* note 2, at 248–49; Nabatchi & Amsler, *supra* note 51, at 73S.

263. Nabatchi, *Putting the "Public" Back*, *supra* note 234, at 701–02; NABATCHI & LEIGHNINGER, *supra* note 2, at 248–49; Nabatchi & Amsler, *supra* note 51, at 73S.

264. See Michael X. Delli Carpini, *In Search of the Informed Citizen: What Americans Know About Politics and Why It Matters*, 4 COMM. REV. 129, 129–64 (2000).

265. See Carolyn J. Lukensmeyer & Steve Brigham, *Taking Democracy to Scale: Creating a Town Hall Meeting for the Twenty-First Century*, 91 NAT'L CIVIC REV. 351, 351–66 (2002).

266. Nabatchi, *Putting the "Public" Back*, *supra* note 234, at 704; NABATCHI & LEIGHNINGER, *supra* note 2, at 249–50; Nabatchi & Amsler, *supra* note 51, at 73S.

are appropriate, depends on the complexity of the issue being examined and the stakes involved.<sup>267</sup>

When issues are of low stakes, information is likely to be less important than when issues are of high stakes.<sup>268</sup> Information can be shared in many ways, including websites, infographics, newspaper articles, short presentations, expert or panel discussions, issue guides, online, or available experts who can answer technical questions.<sup>269</sup>

4. *How Will Participation Impact Policy Decisions, Problem-Solving Efforts, or Other Kinds of Public Action?*

This is usually the most difficult question to answer, in part because impacts are dependent on the recommendations, ideas, and commitment of the participants.<sup>270</sup> Some projects designed to affect policy changes lead instead to a wave of volunteer-driven problem-solving efforts; others that are intended to increase volunteerism instead change policy.<sup>271</sup> Regardless, participation leaders can determine what kinds of questions and choices will best elicit citizen input for policymaking and can support participants in taking action.

When it comes to policymaking, an essential aspect of this question is how much decision-making authority is being given to participants. The International Association for Public Participation (IAP2) Spectrum of Public Participation provides a useful graphic for thinking about how public input will be used.<sup>272</sup> For low stakes issues, public engagement should, at a minimum, provide opportunities for citizens to take part in problem-solving.<sup>273</sup> This is

267. Nabatchi, *Putting the "Public" Back*, *supra* note 234, at 704; NABATCHI & LEIGHNINGER, *supra* note 2, at 249–50; Nabatchi & Amsler, *supra* note 51, at 73S.

268. Nabatchi, *Putting the "Public" Back*, *supra* note 234, at 704; NABATCHI & LEIGHNINGER, *supra* note 2, at 249–50; Nabatchi & Amsler, *supra* note 51, at 73S.

269. Nabatchi, *Putting the "Public" Back*, *supra* note 234, at 704; NABATCHI & LEIGHNINGER, *supra* note 2, at 249–50; Nabatchi & Amsler, *supra* note 51, at 73S.

270. NABATCHI & LEIGHNINGER, *supra* note 2, at 250.

271. See generally MATT LEIGHNINGER, *THE NEXT FORM OF DEMOCRACY: HOW EXPERT RULE IS GIVING WAY TO SHARED GOVERNANCE . . . AND WHY POLITICS WILL NEVER BE THE SAME* (2006).

272. IAP2 *Spectrum of Public Participation*, INT'L ASS'N FOR PUB. PARTICIPATION (2007), [http://c.ymcdn.com/sites/www.iap2.org/resource/resmgr/imported/IAP2%20Spectrum\\_vertical.pdf](http://c.ymcdn.com/sites/www.iap2.org/resource/resmgr/imported/IAP2%20Spectrum_vertical.pdf); see also Nabatchi, *Putting the "Public" Back*, *supra* note 234, at 699–708; NABATCHI & LEIGHNINGER, *supra* note 2, at 263.

273. NABATCHI & LEIGHNINGER, *supra* note 2, at 252.

also important for high stakes issues, as is informing the public about how their input will influence resulting policy decisions and other public actions.<sup>274</sup>

While the nuances of designing participation are far more complex than expressed here, some general rules of thumb can be discerned. When issues are of low stakes, recruitment can be done through voluntary self-selection, interactions can be one-way or two-way, participants need little to no preparation, and officials should focus on supporting citizens to take part in problem solving efforts.<sup>275</sup> In contrast, when issues are of high stakes, proactive network or random sampling recruitment should be used, along with two-way or deliberative interactions, and participant preparation.<sup>276</sup>

Moreover, officials should focus not only on supporting citizens to take part in problem-solving efforts, but also on communicating to and showing participants how their input is being used in the resulting decisions.<sup>277</sup> Beyond these recommendations, several other design choices, for example using facilitators or moderators and building in interest-bases processes, are likely to assist with addressing high stakes issues.<sup>278</sup>

#### VI. INNOVATIONS FOR MINNESOTA TO CONSIDER IN ITS LEGAL FRAMEWORK FOR COLLABORATIVE GOVERNANCE

We have provided a brief review of Minnesota statutes and the current MAPA as it relates to public engagement in collaborative governance.<sup>279</sup> We have also addressed design choices in public engagement and how these may affect outcomes.<sup>280</sup> As Minnesota moves forward in empowering the public's voice in governance, it might consider how to support this work through changes in its legal framework. The national Working Group on Legal

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274. *Id.*

275. Nabatchi, *Putting the "Public" Back*, *supra* note 234, at 700–02; NABATCHI & LEIGHNINGER, *supra* note 2, at 241–52.

276. Nabatchi, *Putting the "Public" Back*, *supra* note 234, at 702–03; NABATCHI & LEIGHNINGER, *supra* note 2, at 241–52.

277. NABATCHI & LEIGHNINGER, *supra* note 2, at 185.

278. For more discussion about how design choices affect conflict and cooperation in participatory processes, see Nabatchi, *Putting the "Public" Back*, *supra* note 234, 699–706.

279. *See supra* Part IV.

280. *See supra* Part V.



Frameworks for Public Participation<sup>281</sup> addressed how an amendment to a state APA (attached as Appendix I) and local ordinances (attached as Appendix II) and policies might open the door to more participatory and deliberative public engagement processes.

Unlike the state APA, Minnesota's open meetings law applies both to state agencies and local government and mandates meetings open to the public.<sup>282</sup> It requires notice of public meetings and defines closed and special meetings.<sup>283</sup> It has a civil

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281. Working Group on Legal Frameworks for Public Participation, *Making Public Participation Legal*, NAT'L CIVIC LEAGUE (Oct. 3, 2013), <https://www.nationalcivicleague.org/making-public-participation-legal/>. The Working Group was comprised of representatives of the American Bar Association Section of Dispute Resolution, Deliberative Democracy Consortium, International Association for Public Participation, International City/County Management Association, National Coalition for Dialogue and Deliberation, National Civic League, National League of Cities, League of Women Voters, California League of Cities' Institute for Local Government, and the International Municipal Lawyers Association, among others. *See id.*

282. MINN. STAT. § 13D.01 (2014) provides in part:

All meetings, including executive sessions, must be open to the public

(a) of a state

- (1) agency,
- (2) board,
- (3) commission, or
- (4) department,

when required or permitted by law to transact public business in a meeting;

(b) of the governing body of a

- (1) school district however organized,
- (2) unorganized territory,
- (3) county,
- (4) statutory or home rule charter city,
- (5) town, or
- (6) other public body;

(c) of any

- (1) committee,
- (2) subcommittee,
- (3) board,
- (4) department, or
- (5) commission,

of a public body . . . .

283. *Id.* § 13D.04.

penalty for violations of the open meetings rules.<sup>284</sup> However, it does not define public participation in open meetings.<sup>285</sup>

Appendix I provides a Public Participation Act as a possible amendment to a state APA and open meetings law.<sup>286</sup> It has a very simple structure.<sup>287</sup> It is an unfunded and inexpensive mandate.<sup>288</sup> It provides a broad definition of public participation processes, requires that agencies develop a policy on public participation, and that they build expertise through a public participation specialist (who can be a collateral duty appointment, meaning an existing employee who receives additional training in public engagement).<sup>289</sup> It protects an agency's power to select among various processes by committing that choice to agency discretion.<sup>290</sup> The broad definition of participatory, deliberative, and consensus-building processes in public participation fosters innovation.<sup>291</sup> The act could conceivably graft its broad definition onto every use of the phrase public participation in the Minnesota state code. It could in a single amendment broaden the authority of agencies and provide guidance for each agency's own rulemaking on public participation.<sup>292</sup>

In addition, or in the alternative, Minnesota's Office of the Chief Administrative Law Judge could use it to prepare model public participation rules through its power to make rules under the state APA. As a sample of content for public participation rules, Appendix II provides a model local government ordinance on

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284. *Id.* § 13D.07.

285. *See id.* § 13D.01.

286. *See infra* Appendix I.

287. *See infra* Appendix I.

288. *See infra* Appendix I.

289. *See infra* Appendix I.

290. *See infra* Appendix I. This language resembles that in the federal Administrative Dispute Resolution Act of 1996, which provides:

A decision by an agency to use or not to use a dispute resolution proceeding under this subchapter shall be committed to the discretion of the agency and shall not be subject to judicial review, except that arbitration shall be subject to judicial review under section 10(b) of title 9.

5 U.S.C. § 581(b) (2014).

291. Bingham, *Next Generation*, *supra* note 26, at 344–45.

292. *Id.*

public participation.<sup>293</sup> It provides standards for best practices and similar suggestions for a policy and specialist.<sup>294</sup>

These models were developed by a national representative working group.<sup>295</sup> Oddly, the working group discovered two issues with the legal framework for public engagement at the state and local government level. The first issue is that public participation is rarely defined in state statutory codes.<sup>296</sup> This causes risk averse legal counsel to construe it narrowly; when advising agencies or local government, they recommend a minimum standard of what we called “three minutes at the microphone.”<sup>297</sup> In the absence of broader legal authority to innovate in public engagement, they seem to take the safe road rather than the high road. It is interesting that the only definition we found in Minnesota’s statutory code was in the judicial branch.<sup>298</sup> The model act in Appendix I could solve this problem.

The second issue we encountered is that legal counsel is particularly wary of violating the state open meetings law. As does Minnesota, many states have civil or criminal penalty provisions for violating rules about notice and agenda for public meetings.<sup>299</sup> For

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293. See *infra* Appendix II.

294. See *infra* Appendix II.

295. See *supra* note 281 and accompanying text.

296. Full documentation of this problem awaits further research. This assertion is based on Amsler’s twenty years of experience teaching a graduate course in public law in which Amsler assigns each student a different state and has them examine the state administrative procedure act for express legal authority for collaborative governance, including dispute resolution, negotiated rulemaking, and public engagement. The authors have not found express definitions of public participation to date in any state APAs. There is no definition in the MSAPA, so state laws are consistent. For many years, a nonprofit named the Policy Consensus Initiative served as a resource for state officials seeking information about government using dispute resolution and collaborative governance processes. That organization now exists under a new name, Kitchen Table Democracy, where it continues to serve as a national resource for government officials seeking information on dispute resolution and collaborative governance. KITCHEN TABLE DEMOCRACY, POLICY CONSENSUS, [www.policyconsensus.org](http://www.policyconsensus.org) (last visited Aug. 12, 2016). Its website provides a rich resource of case studies and information about executive orders and ADR acts. See *id.*

297. See *supra* text accompanying note 43.

298. See *supra* text accompanying notes 138–40.

299. Conversation by Amsler with Steven W. Moore, City Attorney for the City of Yuma, Arizona, president of International Municipal Lawyers Association (Oct. 6, 2012).

this reason, we added an express provision for a special kind of public meeting, a Public Participation Meeting.<sup>300</sup>

The Working Group's purpose with this section is to permit a quorum of an elected or appointed multi-member board or commission to meet with the public in a broadly participatory and deliberative format, without concerns about violating open meeting requirements.<sup>301</sup> The board or commission is prohibited from taking formal action at a public participation meeting as the language expressly provides: "Members of public agencies and municipal authorities, including a quorum, shall not engage in decision-making, or vote upon or take official action at a public participation meeting."<sup>302</sup> Instead, a report of the meeting would provide public information for a future meeting at which the board or commission could take action.<sup>303</sup>

Appendices I and II are not copyrighted documents and available to be reproduced and distributed freely. Language from them has already found a home in city ordinances in Oakland, California.<sup>304</sup> They are annotated with commentary to explain the purpose and intent of each section.<sup>305</sup> As the participants in the symposium and leaders across Minnesota's public, private, and nonprofit sectors move forward with this effort to foster broader,

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300. See *infra* Appendix I, Section Six.

301. Amsler served as secretary and drafter for the documents attached as Appendix I and Appendix II. This statement is based on her personal conversations within the Working Group. See *supra* note 281 and accompanying text.

302. See *infra* Appendix I, Section Six.

303. See *infra* Appendix I, Section Six. Section Six, subsection (b), provides: Public agencies and municipal authorities may consider and make use of information from public participation meetings in a subsequent public meeting at which they take official action, provided that records of the general content of the public participation meeting are made public within three (3) days after the meeting, and are public for a period of at least fourteen (14) days prior to official action.

304. See City Council of the City of Oakland, *A Resolution Establishing the City of Oakland's Budget Process Transparency and Public Participation Policy (12-0424)*, LOCALWIKI: OAKLAND WIKI, [https://oaklandwiki.org/Budget\\_Process\\_Transparency\\_Ordinance](https://oaklandwiki.org/Budget_Process_Transparency_Ordinance) (last visited Aug. 12, 2016); see also *New Policy Guides City of Oakland's Budget Process*, INST. FOR LOCAL GOV'T, <http://www.ca-ilg.org/public-engagement-case-story/new-policy-guides-city-oaklands-budget-process> (last visited Aug. 12, 2016).

305. See *infra* Appendices I, II.

more participatory, inclusive, and deliberative public engagement, we hope that our readers find them useful.

## VII. CONCLUSION

Minnesota can set a new standard for inclusive, democratic public engagement in public decision-making. It takes a strong public policy instantiated through public law encouraging agencies in state and local governments to innovate. It takes an investment in resources to build expertise and experience with well-designed practices for public voice in governance. It also takes an ongoing conversation on best practices among those on the ground across the state.

Many of these elements are already happening on the ground in Minnesota, which well positions the state to be a leader in using dialogue and deliberation in public engagement and decision-making.

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## APPENDIX I

## MODEL STATE PUBLIC PARTICIPATION ACT:

AN AMENDMENT TO THE STATE ADMINISTRATIVE PROCEDURE ACT AND  
GOVERNMENT IN THE SUNSHINE ACT

*Comment: Some states include municipalities as agencies subject to the Administrative Procedure Act. Others do not. The model would need to be adapted to each state's context. In each state, the Act should incorporate by reference that state's statutory definition of state agency or municipal authority (city, town, county, water district, etc.).*

*Whereas*, direct and active participation in self-governance is a widely held value in the United States, and

*Whereas*, knowledge and talent are widely dispersed in society, and all benefit when those skills and abilities are directed toward common goals, and

*Whereas*, public participation and collaboration enhance the Government's effectiveness, expand its range of options, improve the quality of its decisions, and enlist the problem-solving capacities of the general public, and

*Whereas*, public agencies and municipal authorities may collaborate with the general public and state, regional, and local government agencies, tribes, nonprofit organizations, businesses, and other nongovernmental stakeholders to accomplish public work and deliver public services more efficiently and effectively, and

*Whereas*, there have been dramatic changes in the techniques of public participation and the technology allowing for greater transparency of government both through broadcast media and the internet, and

*Whereas*, existing statutory requirements place limits on the interaction between public agencies, municipal authorities, and members of the general public,

*Now therefore*, the [state] Administrative Procedure Act and Government in the Sunshine Act shall be amended as follows:

*Now therefore*, the state of \_\_\_\_ enacts the following Public Participation Act:

## SECTION ONE: DEFINITIONS

For all purposes under this Act,

- a) The phrase “public participation” is defined to include “public engagement,” “community engagement,” “citizen engagement,” “public hearing,” and “public comment” and includes, but is not limited to, any form of in-person, technology-aided, or online communication that provides for discussion, dialogue, or deliberation among participants, allowing residents to engage meaningfully in local problem identification, and/or problem-solving related to community challenges, problems, and opportunities.
- b) Municipal authorities may include [to be defined]
- c) State agencies may include. . .[to be defined]
- d) “Policy process” means any action in developing, implementing, or enforcing public policy, including but not limited to identifying and defining a public policy issue, defining the options for a new policy framework, expanding the range of options, identifying approaches for addressing an issue, setting priorities among approaches, selecting from among the priorities, implementing solutions, rulemaking, project management, and assessing the impacts of decisions.

*Comment: This section is intended to define these terms for all purposes under a state’s statutory code. The intent is to broaden the statutory definition so as to explicitly authorize innovation. Most states use these terms repeatedly across the code, not only in the Administrative Procedure Act, but also in statutes involving land use and transportation planning, the environment, utilities regulation, etc.*

## SECTION TWO: PUBLIC PARTICIPATION POLICY

It is the policy of this state to encourage state agencies and municipal authorities to provide broad, inclusive, deliberative, participatory and meaningful public engagement in the policy process with the general public and stakeholders from the public, private, and nonprofit sectors, including state, regional, and local government agencies, tribes, nonprofit organizations, businesses, and other nongovernmental stakeholders. This act should be construed broadly to promote the fullest opportunity permitted by law to participate meaningfully in governance and the policy process and to provide their Government with the benefits of their collective expertise and information.

*Comment: This section establishes that this is a remedial statute to be construed broadly.*

### SECTION THREE: COMMITMENT TO AGENCY OR MUNICIPAL AUTHORITY DISCRETION

Each state agency shall and each municipal authority may develop a policy on public participation that will allow broad, inclusive, deliberative, participatory, and meaningful public engagement in the policy process. The choice of a particular form of engagement or sequence of opportunities for the public to participate is committed to agency or municipal authority discretion and not subject to judicial review, provided the agency or municipal authority provides some form of public participation, hearing, or comment as required by law.

*Comment: This section is intended to shield agencies and municipal authorities from litigation over the choice of process model, for example, deliberative polling, deliberative town hall meeting, blog, etc.*

### SECTION FOUR: PUBLIC PARTICIPATION SPECIALIST

The head of each state agency shall designate a staff person to be the public participation specialist. This designation may be a collateral duty appointment. The public participation specialist shall be responsible for the implementation of the public participation policy and other provisions of this Act. Each agency shall provide for training on a regular basis for the public participation specialist of the agency and other employees involved in implementing the public participation policy of the agency. The public participation specialist shall periodically recommend to the agency head agency employees who would benefit from similar training.

*Comment: This section locates responsibility for public engagement expertise within an agency or municipal authority. The public engagement specialist can obtain training and expertise that he or she can share with other employees in the agency or municipal authority through in house continuing education. This pyramid structure for disseminating training is cost effective.*



#### SECTION FIVE: COLLABORATION

State agencies, municipal authorities, and other public entities may initiate or participate in collaborative arrangements with one another, tribes, nonprofit organizations, businesses, other nongovernmental stakeholders, and the general public in carrying out any of their powers and duties under state law.

*Comment: This section allows agencies and municipal authorities to collaborate with one another and the broadest public on anything that they could do independently.*

#### SECTION SIX: PUBLIC PARTICIPATION MEETINGS

a) State agencies and municipal authorities may conduct meetings for the sole purpose of public participation provided these meetings are: (1) open to the general public; and (2) a notice stating in general terms the subject matter of the meeting is posted and/or published according to Open Meeting Law. Members of state agencies and municipal authorities, including a quorum, may attend these meetings and interact with the public, including responding to issues and ideas not specifically identified within the original agenda, provided these issues or ideas originate with the public. Members of public agencies and municipal authorities, including a quorum, shall not engage in decision-making, or vote upon or take official action at a public participation meeting.

b) Public agencies and municipal authorities may consider and make use of information from public participation meetings in a subsequent public meeting at which they take official action, provided that records of the general content of the public participation meeting are made public within three (3) days after the meeting, and are public for a period of at least fourteen (14) days prior to official action.

*Comment: This section carves out an exception to the Sunshine Act to permit public officials to attend public engagement meetings and participate in discussion, deliberation, or dialogue with members of the public that may inform their later participation and action on public business.*

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## APPENDIX II

## MODEL MUNICIPAL PUBLIC PARTICIPATION ORDINANCE

*Whereas*, direct and active participation in self-governance is a widely held value in the United States, and

*Whereas*, knowledge and talent are widely dispersed in society, and all benefit when those skills and abilities are directed toward common goals, and

*Whereas*, public participation and collaboration may enhance local government's effectiveness, expand its range of options, improve the quality of its decisions, and enlist the problem-solving capacities of the general public, and

*Whereas*, public agencies and municipal authorities may collaborate with the general public and state, regional, and local government agencies, tribes, nonprofit organizations, businesses, and other nongovernmental stakeholders to accomplish public work and deliver public services more efficiently and effectively, and

*Whereas*, there have been dramatic changes in the techniques of public participation and the technology allowing for greater transparency of government both through broadcast media and the internet,

Now, therefore, the city of \_\_\_\_\_ enacts the following Public Participation Ordinance:

## SECTION 1: DEFINITIONS

For all purposes under this Act,

- a) the phrase "public participation" is defined to include "public engagement," "community engagement," "citizen engagement," "public hearing," and "public comment" and includes, but is not limited to, any form of in-person, technology-aided, or online communication that provides for discussion, dialogue, or deliberation among participants, allowing residents to engage meaningfully in local problem identification, and/or problem-solving related to community challenges, problems, and opportunities.
- b) "Policy process" means any action in developing, implementing, or enforcing public policy, including but not

limited to identifying and defining a public policy issue, defining the options for a new policy framework, expanding the range of options, identifying approaches for addressing an issue, setting priorities among approaches, selecting from among the priorities, implementing solutions, rulemaking, project management, and assessing the impacts of decisions.

#### SECTION 2: PUBLIC PARTICIPATION POLICY

- a) It is hereby declared a matter of public policy that the active public participation of community members to offer comments, ideas and recommendations, both individually and collectively, on public challenges, problems and opportunities is a public good and will be pursued in the interest of the health, prosperity, safety, and welfare of the community, and in the pursuit of effective and trusted governance. Further, as these ends are best achieved by community members who have the opportunity to become informed and to jointly deliberate on public matters prior to offering their ideas and recommendations, that such deliberative opportunities are to be offered when and where possible, and public input received will be considered in final decision-making by the appropriate agency body.
- b) The city and its municipal departments may use any process that meets the principles for public participation set forth in Section 3 in addition to statutorily or federally required forms of public input such as notice and comment or public hearings for public participation.
- c) The city shall adopt and make publicly available a Public Participation Policy to guide the city's use of participation strategies and techniques to satisfy the principles for public participation set forth in Section 3.

#### SECTION 3: PRINCIPLES FOR PUBLIC PARTICIPATION

- a) The following principles govern meaningful and effective public participation:
  - 1) PLANNING AHEAD: Public participation is an early and integral part of challenge and opportunity identification, planning and design, budgeting, and implementation of city policies, programs, and projects.

- 2) **INCLUSIVE DESIGN:** The design of a public participation process includes input from appropriate local officials as well as from members of intended participant communities.
- 3) **AUTHENTIC INTENT:** A primary purpose of the public participation process is to generate public views and ideas to actually help shape local government action or policy.
- 4) **TRANSPARENCY:** Public participation processes are open, honest, and understandable. There is clarity and transparency about public participation process sponsorship, purpose, design, and how decision-makers will use the process results.
- 5) **INCLUSIVENESS AND EQUITY:** Public participation processes identify, reach out to, and encourage participation of the community in its full diversity. Processes respect a range of values and interests and the knowledge of those involved. Historically excluded individuals and groups are included authentically in processes, activities, and decision and policymaking. Impacts, including costs and benefits, are identified and distributed fairly.
- 6) **INFORMED PARTICIPATION:** Participants in the process have information and/or access to expertise consistent with the work that sponsors and conveners ask them to do. Members of the public receive the information they need to participate effectively with sufficient time to study.
- 7) **ACCESSIBLE PARTICIPATION:** Public participation processes are broadly accessible in terms of location, time, and language, and support the engagement of community members with disabilities.
- 8) **APPROPRIATE PROCESS:** Each public participation process uses one or more engagement formats that are responsive to the needs of identified participant groups and encourage full, authentic, effective and equitable participation consistent with process purposes. Participation processes and techniques are well-designed to appropriately fit the legal authority, scope, character, and impact of a policy or project. Processes adapt to changing conditions as projects move forward.
- 9) **USE OF INFORMATION:** The ideas, preferences, and/or recommendations contributed by community members are documented and given consideration by decision-makers. Local officials communicate decisions back to process

participants and the broader public, with a description of how the public input was considered and used.

- 10) **BUILDING RELATIONSHIPS AND COMMUNITY CAPACITY:** Public participation processes invest in and develop long-term, collaborative working relationships and learning opportunities with community partners and stakeholders. This may include relationships with other temporary or ongoing community participation initiatives.
- 11) **EVALUATION:** Sponsors and participants evaluate each public participation process with the collected feedback, analysis, and learning shared broadly and applied to future public participation efforts for continuous improvement.

#### SECTION 4: PUBLIC PARTICIPATION SPECIALIST

The mayor/city manager shall designate a public participation administrator to assist in the implementation of this ordinance and to provide ongoing training in public participation processes for city employees, members of city advisory boards and commissions, and such others as may be determined by the mayor/city manager.

#### SECTION 5: PUBLIC PARTICIPATION ADVISORY BOARD

- a) **ESTABLISHMENT.** A public participation advisory board for the City of \_\_\_\_ is hereby created.
- b) **PURPOSE AND INTENT.** The purpose of this board is to advise the city council on the design, implementation, and evaluation of public participation processes for determining community goals and policies and delivering services.
- c) **DUTIES AND RESPONSIBILITIES.** The board shall have the following duties and responsibilities:
  - 1) Develop and propose to the city council a multi-year plan for public participation to guide the public participation policies, protocols, practices, and assessment of the City of \_\_\_\_\_;
  - 2) Develop guidelines and recommendations to the city council that support inclusive participation and a diversity of viewpoints in public engagement processes; and
  - 3) Provide advice and recommendations to the city council regarding the implementation of public participation guidelines and practices.
  - 4) Review public participation process evaluation results to provide advice and recommendations to the city council

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regarding continuous improvement of public participation policies and practices;

- 5) Provide an annual report to the city council regarding the status of public participation activities.
- d) COMPOSITION. The public participation advisory board shall consist of numbers of members and terms consistent with the practices of the appointing authority. The appointing authority shall give due consideration to recognized qualifications and experiences in the field of public participation and shall designate representatives reflecting the diversity of interests of the broader community.
- e) PROCEDURE. A majority of the board shall constitute a quorum. The commission shall adopt such rules and bylaws as appropriate to further govern its proceedings.
- f) MEETINGS. The board shall hold regular meetings as may be provided by its bylaws, and may hold special meetings on the call of the chairperson or at the request of the city council.

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